Akzo Nobel Inc.
Legal Group

October 30, 2017

VIA ELECTRONIC MAIL

Leonardo Chingcuanco (C-14J)
U.S. Environmental Protection Agency, Region 5
Office of Regional Counsel
77 W. Jackson Boulevard
Chicago, Illinois 60604-3590
Chingcuanco.Leonardo@epa.gov

Re: *U.S. Smelter and Lead Refinery, Inc. Superfund Site* – Akzo Nobel Inc.

Dear Mr. Chingcuanco:

Please accept this letter on behalf of Akzo Nobel Inc. ("AkzoNobel") in response to the September 26, 2017 Request for Information pursuant to Section 104(e) of CERCLA ("RFI") requesting information and documents in relation to the U.S. Smelter and Lead Refinery, Inc. Superfund Site in East Chicago, Indiana (the "Site"). This letter is also responsive to the General Notice Letter for the Site, dated September 22, 2017. EPA has requested information from AkzoNobel related to the Site as a result of alleged arranger status of Euston Lead Company ("Euston"), to which EPA believes AkzoNobel to be the successor. As set forth below, AkzoNobel is not the successor to Euston and therefore has no connection to the Site.

According to the information provided with your letter received on October 16, 2017, EPA believes AkzoNobel to be a successor to Euston due to an alleged connection between AkzoNobel, "The Glidden Company," Euston and the Metals Refining Company of Hammond, Indiana. However, AkzoNobel is not a successor to Euston or Metal Refining Company. As explained more fully below, AkzoNobel is not the successor to any U.S. Glidden interests, as the Glidden legal entity previously affiliated with AkzoNobel was sold to PPG in 2013 and continues as the entity now known as PPG Architectural Finishes, Inc. Moreover, the legal entity formerly affiliated with AkzoNobel and now known as PPG Architectural Finishes, Inc., is not the Glidden entity which is believed to have acquired Euston and/or Metals Refining Company or any liability associated with either of those entities' operations.

The following describes key aspects of this corporate history in more detail, based on my current understanding:

- The first "Glidden" was The Glidden Company, an Ohio corporation (referred to herein as "Old Glidden").

525 West Van Buren Street
Chicago, IL 60607-3835
United States

T +1 312 544 7381
F + 1 312 544 7379
www.akzonobel.com

- In 1924, Old Glidden acquired the Euston Lead Company of Scranton, Pennsylvania. Sometime later, Old Glidden bought the Metals Refining Company of Hammond, Indiana.

- Old Glidden operated several different divisions, including a Paints Division and a separate Chemicals and Pigments Division, which housed its pigments operations including operations in Scranton, Pennsylvania, and Hammond, Indiana.

- In 1967, Old Glidden merged into SCM Corp. In 1976, SCM Corp. placed the Glidden pigments business in SCM Corp.'s Chemical/Metallurgical Division and the paint business in the Coatings & Resins Division. In 1985, SCM Corp. transferred the assets of the pigments business to a new, wholly-owned subsidiary, ABC Chemicals, which changed its name to SCM Chemicals in 1986.

- In 1986, SCM Corp. was acquired by Hanson Trust PLC, which liquidated the company, distributing the assets and liabilities of various businesses into a number of "fan" companies. The Coatings and Resins Division became HSCM-6. The pigments business and the assets of SCM Corp. remaining after the transfers to the fan companies, including the stock of SCM Chemicals and the stock of the other fan companies, were distributed to HSCM-20, which assumed the liabilities related to those assets.

- In 1986, ICI American Holdings, Inc. acquired HSCM-6, the Coatings and Resins business, which was renamed The Glidden Company, a Delaware corporation ("New Glidden"). In 2008, AkzoNobel acquired ICI, including New Glidden. Following the acquisition, New Glidden became known as Akzo Nobel Paints LLC. In 2013, Akzo Nobel Paints LLC (New Glidden) was sold to PPG Industries and renamed PPG Architectural Finishes, Inc.

- According to a history contained in an Ohio Supreme Court opinion, HSCM-20, the entity that retained the pigments business and associated liabilities, was renamed SCM Corporation (SCM 2). SCM 2 merged into HSCM Holdings, Inc., which then changed its name to SCM Corporation (SCM 3). In 1988, SCM 3 merged into HM Holdings, making SCM Chemicals a subsidiary of HM Holdings. In 1996, the parent of HM Holdings was sold to Millennium Chemicals Inc. HM Holdings merged into Millennium Holdings and the SCM Chemicals subsidiary changed its name to Millennium Inorganic Chemicals. In 2001, through another merger, Millennium Inorganic Chemicals became Millennium Holdings LLC.

If USEPA discovers any additional information demonstrating a potential connection between the Site and AkzoNobel, please provide such documentation to me so that we can further evaluate that information. To the extent AkzoNobel discovers any additional information, such information will be provided. Please let me know if you have any questions regarding our enclosed response or if we can provide further assistance in this matter.

Sincerely,

Katherine Rahill
Director, Legal - Health, Safety and Environment

Enclosures

Akzo Nobel Inc. Response to U.S. Smelter and Lead Refinery, Inc. Superfund Site

Request for Information Pursuant to Section 104(e) of CERCLA

Akzo Nobel Inc. ("AkzoNobel") hereby responds to the Request for Information pursuant to Section 104(e) of CERCLA sent to AkzoNobel and received on September 29, 2017.

Please note that the entity alleged to have arranged for disposal at U.S. Smelter and Lead Refinery, Inc. Superfund Site (the "Site") is the Euston Lead Company, to which AkzoNobel is alleged to be a successor. However, as described in more detail in Response #4 below, AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company. AkzoNobel is not the successor to any U.S. Glidden interests, as the Glidden legal entity previously affiliated with AkzoNobel was sold to PPG in 2013 and continues as the entity now known as PPG Architectural Finishes, Inc. Moreover, the legal entity formerly affiliated with AkzoNobel and now known as PPG Architectural Finishes, Inc., is not the Glidden entity which is believed to have acquired Euston Lead Company and/or Metals Refining Company or any liability associated with either of those entities' operations.

As directed, AkzoNobel has provided a separate narrative response to each request and subpart of each question. AkzoNobel responds to the questions posed and the information requested subject to the following objections. AkzoNobel objects to the EPA's Information Request to the extent that the questions, either by themselves or in conjunction with the definitions or instructions contained therein, seek disclosure of information or documents that are protected by the attorney-client privilege or the attorney work-product doctrine. AkzoNobel further objects to the questions to the extent they are overly broad and/or seek information that is outside of the scope of the discovery process. Without waiving these objections, AkzoNobel will provide information that is responsive to CERCLA § 104(e)(2)(C).

Without waiving these objections and subject to these objections, AkzoNobel responds as follows:

QUESTIONS AND RESPONSES

1. Identify the respondents to these questions.

   Response: Katherine Rahill, Legal Director – Health, Safety, and Environment, 525 West Van Buren Street, Chicago, Illinois 60607, 312-544-7381, katherine.rahill@akzonobel.com, is responding to these questions on AkzoNobel's behalf.

2. Identify all persons consulted in the preparation of the answers to this request for information.

   Response: The following persons were consulted in the preparation of these answers:

   Katherine Rahill, Legal Director – Health, Safety, and Environment

   Robert R. Kovalak, Independent Environmental Consultant for AkzoNobel

3. If you have reason to believe that there may be persons able to provide a more detailed or complete response to any question or who may be able to provide additional responsive documents, identify such persons.

   Response: AkzoNobel is not aware of any persons responsive to this request.

4. For each and every question contained herein, identify all documents consulted, examined, or referred to in the preparation of the answer or that contain information responsive to the question and provide true and accurate copies of all such documents.

Response: As stated above, AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and, as such, has no documents related to the Site.

AkzoNobel is not the successor to any U.S. Glidden interests, as the Glidden legal entity previously affiliated with AkzoNobel was sold to PPG in 2013 and continues as the entity now known as PPG Architectural Finishes, Inc. Moreover, the legal entity formerly affiliated with AkzoNobel and now known as PPG Architectural Finishes, Inc., is not the Glidden entity which is believed to have acquired Euston Lead Company and/or Metals Refining Company or any liability associated with either of those entities' operations.

The following describes key aspects of this corporate history in more detail, based on current understanding:

- The first "Glidden" was The Glidden Company, an Ohio corporation (referred to herein as "Old Glidden").

- In 1924, Old Glidden acquired the Euston Lead Company of Scranton, Pennsylvania. Sometime later, Old Glidden bought the Metals Refining Company of Hammond, Indiana.

- Old Glidden operated several different divisions, including a Paints Division and a separate Chemicals and Pigments Division, which housed its pigments operations including operations in Scranton, Pennsylvania, and Hammond, Indiana.

- In 1967, Old Glidden merged into SCM Corp. In 1976, SCM Corp. placed the Glidden pigments business in SCM Corp.'s Chemical/Metallurgical Division and the paint business in the Coatings & Resins Division. In 1985, SCM Corp. transferred the assets of the pigments business to a new, wholly-owned subsidiary, ABC Chemicals, which changed its name to SCM Chemicals in 1986.

- In 1986, SCM Corp. was acquired by Hanson Trust PLC, which liquidated the company, distributing the assets and liabilities of various businesses into a number of "fan" companies. The Coatings and Resins Division became HSCM-6. The pigments business and the assets of SCM Corp. remaining after the transfers to the fan companies, including the stock of SCM Chemicals and the stock of the other fan companies, were distributed to HSCM-20, which assumed the liabilities related to those assets.

- In 1986, ICI American Holdings, Inc. acquired HSCM-6, the Coatings and Resins business, which was renamed The Glidden Company, a Delaware corporation ("New Glidden"). In 2008, AkzoNobel acquired ICI, including New Glidden. Following the acquisition, New Glidden became known as Akzo Nobel Paints LLC. In 2013, Akzo Nobel Paints LLC (New Glidden) was sold to PPG Industries and renamed PPG Architectural Finishes, Inc.

  According to a history contained in an Ohio Supreme Court opinion, HSCM-20, the

entity that retained the pigments business and associated liabilities, was renamed SCM Corporation (SCM 2). SCM 2 merged into HSCM Holdings, Inc., which then changed its name to SCM Corporation (SCM 3). In 1988, SCM 3 merged into HM Holdings, making SCM Chemicals a subsidiary of HM Holdings. In 1996, the parent of HM Holdings was sold to Millennium Chemicals Inc. HM Holdings merged into Millennium Holdings and the SCM Chemicals subsidiary changed its name to Millennium Inorganic Chemicals. In 2001, through another merger, Millennium Inorganic Chemicals became Millennium Holdings LLC.

Attachments A, B, C and D were used in responding to this request.

To the extent any additional documents responsive to other requests exist, they are referenced in the individual responses.

5. Describe the lead-bearing material that Respondent arranged to have treated, disposed of, or transported to the Site.

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

6. Provide the correct name and addresses of Respondent's plants and other facilities where Respondent carried out operations that acquired, generated, or came to possess lead-bearing material that came to be located at the Site.

   a. For each of those plants or facilities, provide a brief description of the nature of Respondent's operations at that plant or facility, including the date such operations commenced and concluded; and

   b. Provide a brief description of the types of work performed at each plant or facility, including but not limited to the industrial, chemical, or institutional processes and treatments undertaken at each plant or facility.

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

7. Describe any arrangement whereby Respondent came to own or possess lead-bearing material that came to be located at the Site, without that material being processed or routed through any of Respondent's plants or facilities.

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

8. What was the monthly or annual quantity of lead-bearing material that Respondent arranged to have treated, disposed of, or transported to the Site?

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

9. What was the total quantity of lead-bearing material that Respondent arranged to have treated, disposed of, or transported to the Site?

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

10. Was lead-bearing material treated at Respondent's plants or facilities before transport to the Site?

a. What treatment process(es) took place?

b. What was the result?

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

11. Was lead-bearing material separated (e.g., physically or chemically) from other materials at Respondent's plants or facilities, before transport to the Site?

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

12. Describe how each type of lead-bearing material was collected and stored at Respondent's Facility prior to disposal/treatment/recycling/sale/transport at or to the Site.

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

13. Identify any third parties other than USS Lead that Respondent sent or arranged to send lead-bearing material to for treatment, and the dates the lead-bearing material was sent for treatment, where they were sent for treatment, what treatment processes took place, the result of the treatment process, and the disposition of the lead-bearing material.

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

14. Apart from contracting for treatment or disposal of lead-bearing material through another entity or party, did Respondent ever dispose of lead-bearing material itself?

a. If so, describe in detail the circumstances of Respondent's disposal, including what was disposed, when the disposal(s) took place, where the substances were disposed, and the quantity, amount or volume disposed. Include any documentation related to such disposal.

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

15. With respect to lead-bearing material of the type treated at, disposed of at, or transported to the Site, explain what Respondent did with these materials if Respondent could not find a buyer to purchase such material, including all methods of use, handling, treatment, sale, recycling, and disposal, and how much Respondent paid or received for each such method.

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

16. For each type of lead-bearing waste, describe Respondent's agreements or other arrangements for its disposal, treatment, storage, recycling or sale.

a. Provide any agreement and document, including waste logs, journals, or notes, related to any transfer of lead-bearing waste from Respondent's facilities or plants that came to be located at the Site.

b. Provide all correspondence and written communications, including but not limited to emails, between Respondent and U.S. Metals Refining Company, U.S. Smelter and Lead Refinery, Inc., U.S. Smelter, Refining and Metals Company, regarding the Respondent's lead-bearing waste that came to be located at the Site.

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

17. Did Respondent sell or transfer the lead-bearing waste to other locations besides the Site?

a. If so, provide any agreements and documents, including waste logs, journals, or notes, related to the transfer of the lead-bearing waste from Respondent's plants or facilities to locations other than the Site.

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

18. Did Respondent ever request from the buyer that lead or lead-bearing material be returned to Respondent after buyer's treatment or handling of the lead-bearing waste was completed?

a. If so, explain the details of such transaction(s). Provide any documentation relating to nay return to Respondent of lead or lead-bearing wastes.

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

19. Identify, describe, and provide all documents that refer or relate to:

a. The nature, including chemical content, characteristics, physical state (e.g., solid, liquid) and quantity (volume and weight) of all lead-bearing waste involved in each arrangement transferring materials from any facility owned or operated by Respondent to any other facility.

b. The condition of the transferred material containing hazardous substances when it was stored, disposed of, treated or transported for disposal or treatment.

c. The markings on and type, condition and number of containers in which the hazardous materials were contained when they were stored, disposed, treated, or transported for disposal or treatment.

d. All tests, analyses, analytical results and manifests concerning each lead-bearing waste involved in each transaction. Include information regarding who conducted the test and how the test was conducted (batch sampling, representative sampling, splits, composite, etc.)

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

20. Provide any correspondence or other communications between Respondent and the buyer regarding what the buyer planned to do with the lead-bearing waste.

Response: AkzoNobel has no information responsive to this Request. AkzoNobel is not a successor to Euston Lead Company or Metal Refining Company and has no knowledge of Respondent's operations.

Enclosure D
Information Request
USS Lead Site

DECLARATION

I declare under penalty of perjury that I am authorized to respond on behalf of the Respondent and that the foregoing is complete, true, and correct.

Executed on OCTOBER 30, 2017.

Signature

KATHERINE PAHILL
Type or Print Name

DIRECTOR, LEGAL - H,SE
Title

ATTACHMENT A

THE GLIDDEN COMPANY

CLEVELAND, OHIO

January 7, 1927.

TO THE STOCKHOLDERS:

The Condensed Consolidated Balance Sheet and Operating Statement of the Company and its Subsidiaries as of the close of business October 31, 1926 shows that the last fiscal year was a satisfactory one.

The final net sales figures for the year show an increase of $1,662,267.91 over the previous year.

The Final Net Profit was $1,861,945.33 after Depreciation Charges of $323,260.12 and Reserve for Federal Taxes of $268,000. These profits are equivalent to $26.05 on the Prior Preference stock of the Company, and after provision for Prior Preference dividends, amounts to $3.40 per share on the No Par Common Capital stock of the Company.

It is interesting to note that since the Company was reorganized December 31, 1919, Depreciation Charges amounting to $1,985,165.29 have been absorbed against profits, while during the same period charges aggregating $1,221,916.84 have also been absorbed covering repairs, upkeep and maintenance of plants and equipment. The result is that the fixed property of the Company is carried on a conservative basis and at no time have our plants been in better physical condition or in more efficient operating condition than they are today.

The purchase money mortgages shown on the statement are in connection with the purchase of a Lithopone plant at Collinsville, Illinois and a purchase of land and rebuilding of a Lithopone plant at Oakland, California. With the addition of these facilities for manufacturing Lithopone, the Company is now the second largest manufacturer of Lithopone in the United States.

The ratio of Current Assets to Current Liabilities has shown an improvement with a further reduction in bank loans. Because of the extensive nature of the company's operations, the Directors have thought it wise to add $500,000 to Contingent Reserve by transfer from Surplus.

The management looks forward with confidence to satisfactory operations during the fiscal year 1927, and with the benefit of the experience it has already had in budget control in all departments of the business, it is expected that a further improvement in factory and operating costs will be reflected in an increasing margin of profit.

At no time in the history of the Company has the personnel been more active or efficient, and I wish to take this occasion to extend the thanks of the Officers and Board of Directors to the faithful employees of the Company for their earnest and sincere efforts during the year.

Yours truly,

ADRIAN D. JOYCE,
President.

ADJ-V

CONDENSED CONSOLI

THE GLIDDEN COMPANY -

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ASSETS

Current			
Cash on Hand, On Deposit and In Transit		$ 445,102.99	
Customers' Notes, Trade Acceptances and Accounts Receivable, less allowance for Doubtful Accounts, Discounts, etc.		4,002,472.14	
Miscellaneous Currect Accounts Receivable		74,242.08	
Inventory on basis of lower of cost or market		5,283,910.78	$ 9,805,727.99
Other Assets			
Net Expenditures and Advances to October 31, 1926 in connection with acquisition of interest in mining property of the California Zinc Company and Afterthought Zinc Mining Company		995,596.38	
Cash Surrender Value of Life Insurance Policies		56,759.75	
Miscellaneous Notes and Accounts, Salesmen's Advances, Capital Stock Owned, etc.		92,230.99	1,144,587.12
Permanent			
Land		1,399,470.40	
Buildings, Machinery, Equipment, etc.	$9,153,808.15		
Less: Allowance for Depreciation	1,985,165.29	7,168,642.86	
Ore Lands and Leases, less allowance for Depletion		403,809.17	8,971,922.43
Good-Will, Patents, Trade-Marks, Reorganization and Development Expense and Unamortized Portion of Bond Discount, etc.			1,227,864.32
Stock Held for Retirement			
Prior Preference Stock held for Retirement—At Cost			20,740.00
Deferred			
Inventory of Advertising Stock, Stationery, Factory Supplies, Prepaid Interest, Taxes, Unexpired Insurance Premiums, etc.			365,357.53
(Note A) This Balance Sheet is subject to any adjustment found necessary upon determination of final liability of the Companies for taxes.			$21,536,199.39

Board of Directors and Stockholders,
The Glidden Company,
Cleveland.

Cleveland, Ohio.
January 3, 1927.

Gentlemen:—

We have prepared and submit herewith Condensed Consolidated Balance Sheet setting forth the Assets and Liabilities of THE GLIDDEN COMPANY—CLEVELAND, and SUBSIDIARIES, as of the close of business October 31, 1926, subject to the following comments:

Cash Funds and Customers' Notes and Trade Acceptances Receivable, as stated, were independently verified by us, with the exception of Cash Funds and Notes at certain branches and stores, which are included as shown by the records. The correctness of the amount representing unpaid balances on Customers' Accounts Receivable was evidenced by detailed trial balances of the individual accounts submitted to us and which were thoroughly tested by comparison with the recorded ledger balances. Sufficient allowance, in our opinion, has been provided for doubtful accounts, etc. Merchandise Inventories are represented as taken and priced under the direction of the management on the basis of the lower of cost or market values, certified to us by a responsible

) BALANCE SHEET

AND, AND SUBSIDIARIES

OCTOBER 31, 1926

LIABILITIES			
Current			
Notes Payable for Money Borrowed		$ 850,000.00	
Notes Payable—For Purchase of Property		73,333.34	
Accounts Payable, Customers' Credit Balances and Miscellaneous Accounts		961,289.53	
Accrued Taxes, Bond Interest, Insurance Royalties, etc.		172,194.76	$ 2,056,817.63
Reserve			
For Estimated Federal Taxes			268,000.00
Deferred			
Note given in connection with acquisition of Subsidiary Company			180,000.00
Bond and Mortgage Indebtedness			
First Mortgage 6% Gold Bonds The Glidden Company:			
Authorized	$3,000,000.00		
Less: Retired	100,000.00	2,900,000.00	
Sundry 6% Bonds and Mortgage of Subsidiary Companies Outstanding		684,000.00	3,584,000.00
Reserve			
For General Contingencies			687,818.41
Capital Stock—Minority Interest (The Glidden Stores Company)			12,605.00
Capital Stock (The Glidden Company)			
Prior Preference 7% Cumulative			
Authorized 75,000 shares	$7,500,000.00		
Less: Unissued and Retired 3,337 shares	333,700.00	7,166,300.00	
Common (No Par Value)			
Authorized 500,000 shares			
Issued 400,000 shares			
Declared Value of $5.00 per share		2,000,000.00	9,166,300.00
Surplus			
Balance October 31, 1926.			5,580,658.35
			$21,536,199.39

official of the Company, and thoroughly tested by us as to mathematical accuracy and method of valuation.

Other Assets include net expenditures and advances made to October 31, 1926, as shown by the records of The Glidden Company, in connection with the Company's acquisition of interest in California mining property concerning which, we have been assured, the items involved are properly capitalizable or of an investment nature.

The liabilities stated include full provision for all ascertained obligations of the Companies as of October 31, 1926, disclosed by the records examined and information obtained by us. A reserve in the amount of $500,000.00 has been provided for general contingencies through a corresponding charge to the Surplus Account.

Subject to the foregoing, WE HEREBY CERTIFY, that, in our opinion, based upon the records examined and information obtained by us and subject to any necessary adjustment upon determination of final liability for Taxes, the accompanying Condensed Consolidated Balance Sheet is drawn up so as to correctly set forth the financial position of THE GLIDDEN COMPANY —CLEVELAND, and SUBSIDIARIES, as of the close of business October 31, 1926.

Very truly yours,
Ernst & Ernst
Certified Public Accountants.

CONDENSED CONSOLIDATED OPERATING STATEMENT

THE GLIDDEN COMPANY—CLEVELAND, AND SUBSIDIARIES

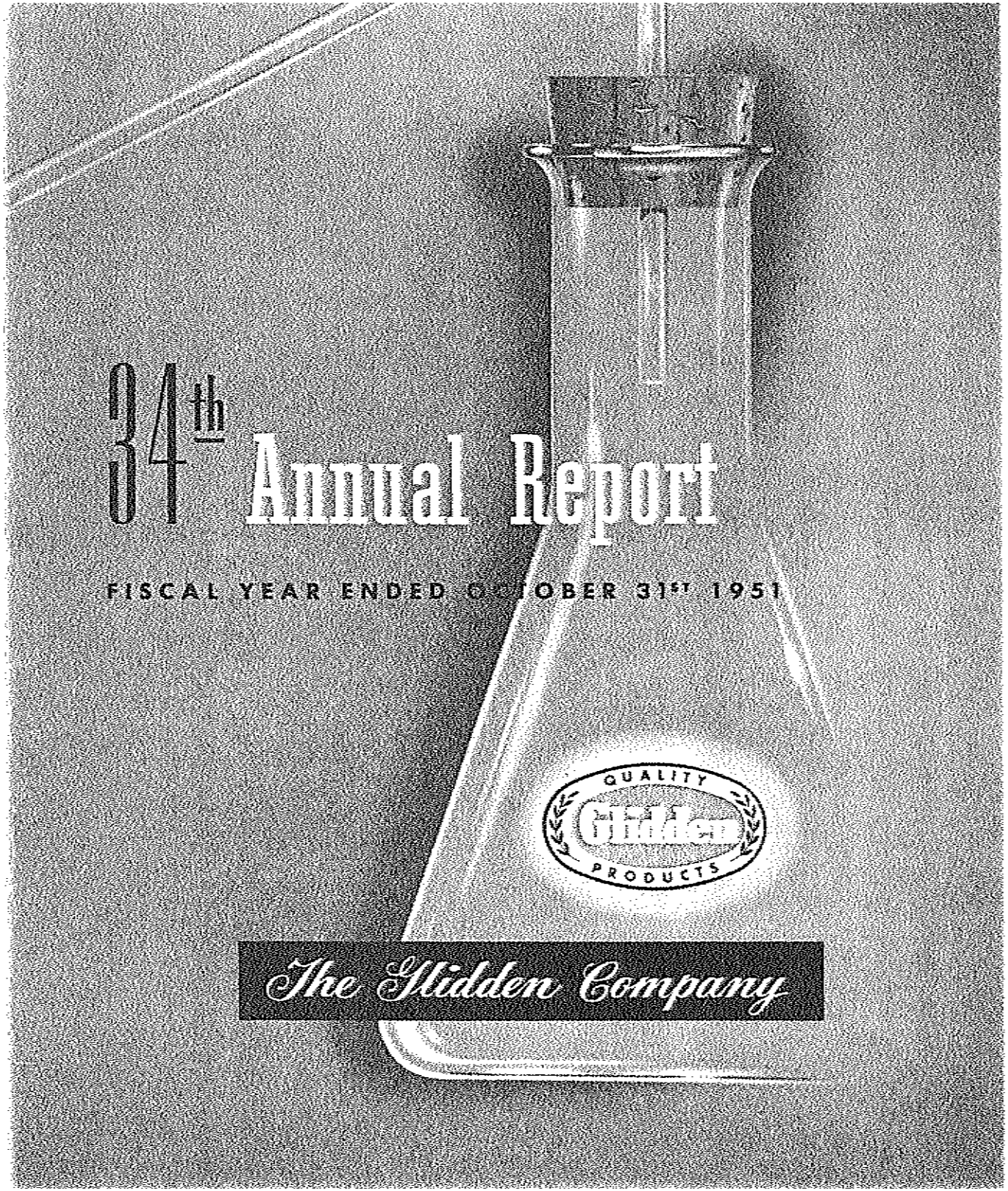
For the Fiscal Year Ended October 31, 1926.

Profit before Interest Charges, Depreciation, Federal Taxes and Other Deductions	$2,969,374.94
Interest on Bonds, Borrowed Money and Other Deductions—Net	516,169.49
Profit before providing for depreciation and Federal taxes	$2,453,205.45
Provision for Depreciation	323,260.12
Profit before providing for Federal taxes	2,129,945.33
Provision for Estimated Federal Taxes	268,000.00
Net Profit	$1,861,945.33

CONSOLIDATED SURPLUS

Balance October 31, 1925.			$5,429,394.08
Additions			
Net Profit from operations for the fiscal year ended October 31, 1926	$1,861,945.33		
Credit arising from the adjustment of book value of Buildings, Machinery and Equipment of the Lithopone Plant at Oakland, California, to conform to independent appraised value as of August 15, 1926, after adjusting such book value to include net expenditures to October 31, 1926.	193,061.14		
Discount on 1,677 shares of 7% Prior Preference Stock retired during the current fiscal year	14,971.00		
Total Additions		$2,069,977.47	
Deductions			
Dividends paid during the current fiscal year: Common—$2.00 per share	$ 798,750.00		
Prior Preference—7%	497,799.91		
Transferred from Surplus Account to create Reserve for General Contingencies	500,000.00		
Inventory adjustments—Lithopone Plant, St. Helena, Maryland, applicable to prior period	109,518.35		
Discount on 1,390 shares of 7% Prior Preference Stock issued in exchange for all of the outstanding Capital Stock of Subsidiary Company and for other Property acquired during the current fiscal year	11,660.00		
Preferred Dividends paid by The Glidden Stores Company to minority stockholders (Funds advanced therefor by The Glidden Company)	910.00		
Miscellaneous Debit Adjustments	74.94		
Total Deductions		$1,918,713.20	
Net Addition			151,264.27
Surplus October 31, 1926			$5,580,658.35

ATTACHMENT B



Annual Report of The Glidden Company Year of 1951

To the Stockholders

January 15, 1952

YOUR COMPANY'S net sales in 1951 reached a record level of $228,522,503, which is a gain of 21.2 per cent above last year and 13 per cent above the total for 1948, the previous high sales year. Unit volume of sales also was the highest on record.

From this gratifying volume of business, the company achieved the largest operating profit before taxes in its history. Profits before taxes amounted to $16,000,868, an increase of $1,563,208 over 1950 and the second highest on record. Provision for income taxes, however, was $7,687,000 or 31% above the 1950 provision and resulted in a slightly lower net.

Net profit after taxes and all charges was $8,313,868, compared to $8,561,660 in 1950. This was equal to $3.65 per share on the 2,280,238 shares outstanding at October 31, 1951.

Two major financial accomplishments were realized during the year. The first of these was the successful negotiation of a long-term loan of $10,000,000, at a rate of 3 per cent, evidenced by unsecured serial notes with the first note maturing in 1953. This made possible the retirement of short term borrow-

ings and placed the company in excellent position to meet the increased demands for working capital.

A SECOND MAJOR achievement was the redemption on October 1, 1951, of the 4½ per cent convertible preferred stock. Of the 199,540 shares outstanding at October 31, 1950, there were 199,264 shares converted by the issuance of 296,745 common shares. Only 276 shares were redeemed for cash.

These moves immeasurably strengthened your company by stabilizing interest rates at a favorable level, at a time when interest rates are rising, and by the removal of the senior stock issue.

The company's 1952 excess profits tax base is approximately $19,000,000, which at current tax rates will allow earnings of approximately $4.00 per share on 2,280,238 shares now outstanding before excess profits rates apply.

Our inventories are well balanced and exceptionally low in relation to sales volume. Gross inventories of $34,337,126, before deduction of LIFO Reserve, are $759,080 below last year.

Under the LIFO plan the company has a reserve of $3,226,652 to take care of market variations.

WORKING CAPITAL at October 31, 1951 totalled $46,416,236, an increase of $7,996,199 over a year ago. The net worth of the company increased $3,544,492 to $69,738,651.

Net plant additions during the year amounted to $4,499,196, and maintenance expenditures were $2,782,457. Since the beginning of 1946, net plant additions have amounted to $21,456,383. Your company's properties are all in excellent condition and no large expenditure for plant is contemplated for 1952. Among the important additions in 1951 was the new titanium plant at Baltimore, which is now in full production.

During the year a favorable settlement was effected with the federal government on our open tax matters through the year 1947. We do not anticipate any major adjustments in the remaining open years.

The company's retirement funds for employees now total $3,798,805, deposited with bank trustees.

Our wholly owned Canadian subsidiary enjoyed a highly satisfactory year, with a profit gain before taxes of 42 per cent.

One of the most promising of the year's developments was the agreement made with the Defense Minerals Administration for exploratory diamond drilling on the company's zinc properties in California, with an accompanying plan for opening up these mines. Half the cost of this exploratory drilling will be borne by the government. These mines were closed in 1927 because zinc concentrates were selling at $30 a ton, and to have continued operations would have meant depleting the ore at no profit to the company. The price of zinc concentrates is now approximately $135 per ton and the prospects for these properties are very bright. Diamond drilling started on December 17th.

YOUR COMPANY, like other large users of soya beans, was affected by the Chinese speculation in this commodity early in 1951. During the first half of the fiscal year markets advanced sharply and then reacted, creating a number of difficulties which were ultimately surmounted by our fine organization.

Completed last summer was a new soya extraction unit in Buena Park, California, one of the first of its kind on the Pacific Coast. A highly flexible operation, it can process soybeans, flaxseed and safflower seed. It is the first to produce 44 per cent meal for the West Coast's rapidly expanding poultry industry and will help cut poultry losses when floods and other transportation tie-ups delay shipments from midwestern soya meal producers. Production rate exceeds rated capacity, since Glidden

engineers were able to incorporate several features previously used in your company's Chicago and Indianapolis solvent extraction plants.

LATE IN the 1951 calendar year your company achieved a major victory both for Glidden and for all of American industry when a jury in a Pittsburgh federal court cleared The Glidden Company and E. I. du Pont de Nemours & Co. of charges of price fixing. Vindicating your company's stand, this just and highly gratifying verdict ended litigation which began in 1948 and which not only caused great expense but interfered materially with the conduct of our regular business.

This victory was especially noteworthy because most other major paint manufacturers and a number of individuals had been similarly charged. All of these concerns, except Glidden and du Pont, pleaded nolo contendere and accepted relatively small fines.

Your company's determination to defend its splendid name and reputation proved to be more than sound and The Glidden Company has been extolled by editorial and financial observers throughout the country as a courageous defender of the American system.

This case has also brought into sharp focus the great need for Congressional legislation which will enable innocent defendants to recover their expenses.

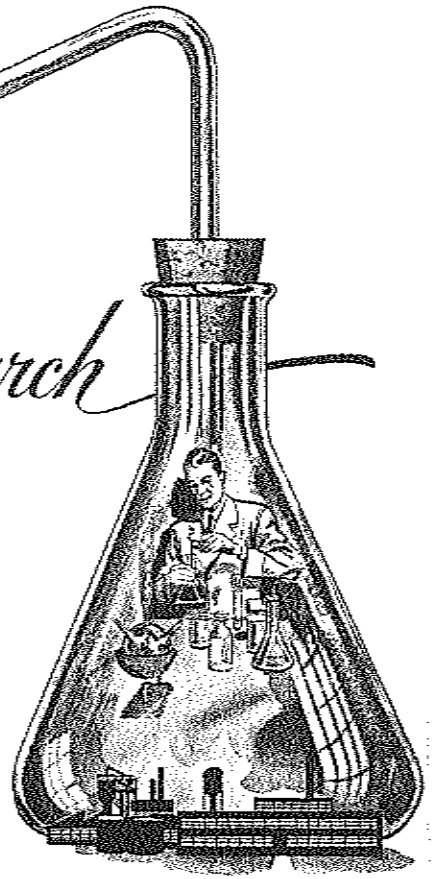
During the fiscal year just ended all divisions of your company maintained or improved their position. Although we face another year which is difficult to forecast, your officers and directors are confident your company will continue to make substantial progress.

The loyal cooperation of all executives and employees is gratefully acknowledged.

DWIGHT P. JOYCE,
President

ADRIAN D. JOYCE,
Chairman of the Board.

quality products through *Research*



EVER SINCE The Glidden Company was founded by Adrian D. Joyce in 1917, research has been one of the most important factors in the growth and prosperity of the company.

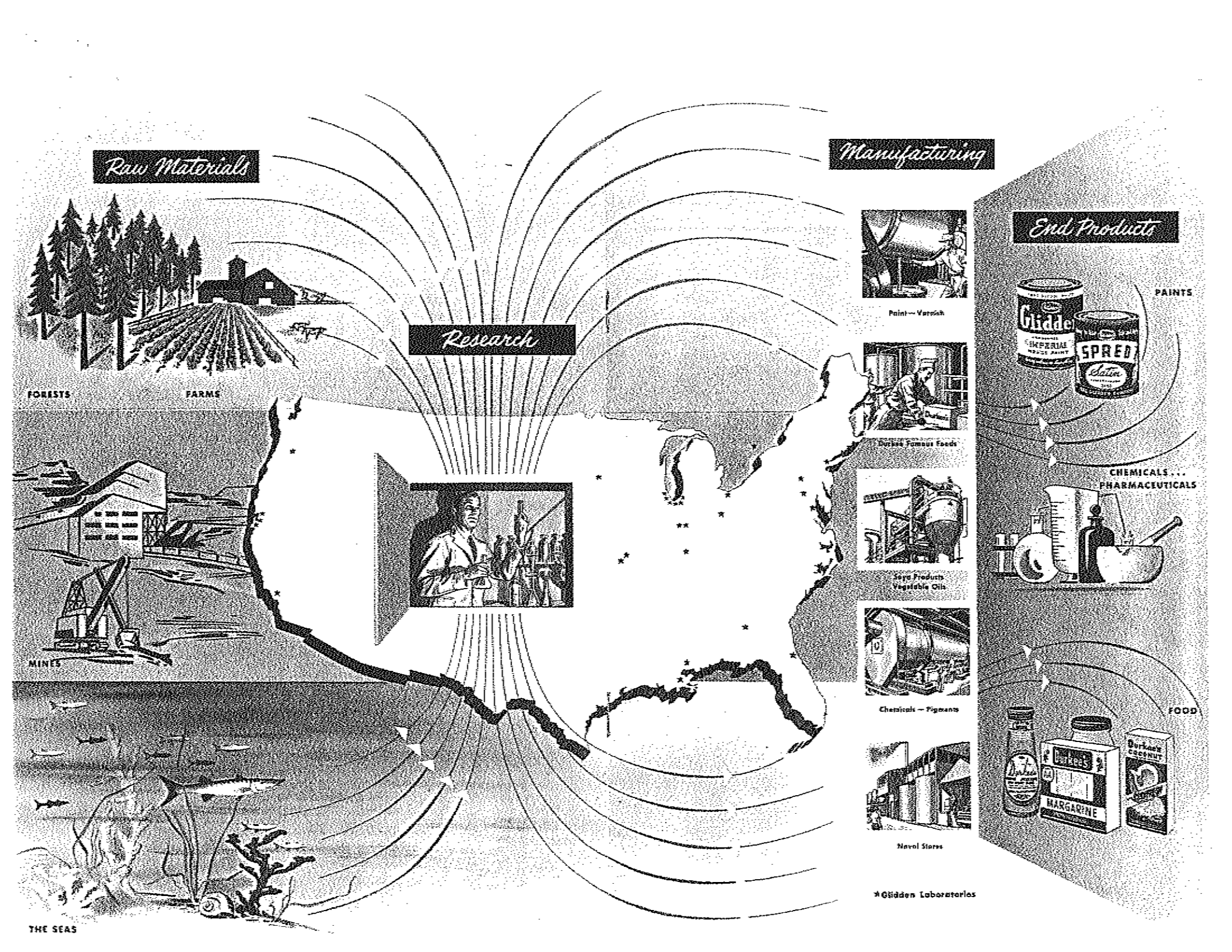
From your company's faith in imaginative, creative research, in development of new and better raw materials and better production methods, have come the fine products which have made the name "Glidden" a household word and which have made your company one of the world's most important producers of materials and products for industry.

Among the most famous Glidden products are: Spred Satin, the rubber base interior paint which almost overnight revolutionized the paint industry; cortisone, vital sex hormones, growth factors from fish solubles, alpha protein, cadmium colors, camphene and countless others.

During 1951 the energies of some 300 scientific workers were devoted to research. Their resourcefulness was largely responsible for increased output despite serious shortages in vital raw materials. Their work was invaluable.

Glidden now operates twenty-eight laboratories in which the search for improvement goes on continually. The raw materials used — many of them produced by Glidden — and each of the thousands of Glidden products are carefully checked to assure the highest possible quality at all times.

On the following two pages is an illustration of the nature and extent of The Glidden Company's research activities. Materials from the farm, the mine, the forest and the sea are analyzed, refined, combined and, in a sense, created to provide the nation with the finest products of their kind obtainable.


Raw Materials
Research
Manufacturing
End Products
FORESTS
FARMS
MINES
THE SEAS
Paint — Varnish
Durkee Famous Foods
Soya Products
Vegetable Oils
Chemicals — Pigments
Naval Stores
*Glidden Laboratories
PAINTS
Glidden
IMPERIAL
SPRED
CHEMICALS...
PHARMACEUTICALS
FOOD
Durkees
MARGARINE
Durkee's
COCONUT

Consolidated Balance Sheet

THE GLIDDEN COMPANY AND SUBSIDIARIES • OCTOBER 31, 1951

ASSETS

CURRENT ASSETS

Cash		$13,036,143.43
Trade accounts receivable, less allowances of $523,330.98 for doubtful accounts		15,618,863.92
Inventories—raw materials, in process, and finished goods		
Principal raw materials are stated at cost (last-in, first-out method) which did not exceed replacement market; other items are stated at the lower of cost (accumulated average) or replacement market		31,110,474.20
Other current notes and accounts receivable, advances and investments		2,787,281.79
TOTAL CURRENT ASSETS		$62,552,763.34

OTHER ASSETS

Prepaid insurance and expenses	$ 865,515.68	
Cash surrender value of life insurance	791,199.50	
Miscellaneous notes and accounts receivable, advances and investments	771,718.81	2,428,433.99

PROPERTY, PLANT, AND EQUIPMENT

Gross amounts represent cost less write-down in 1932

Land	$ 2,927,117.31	
Buildings, machinery, and equipment	47,244,526.12	
	$50,171,643.43	
Less accumulated depreciation, depletion, and amortization	19,277,661.72	30,893,981.71
		$95,875,179.04

LIABILITIES, CAPITAL STOCK, AND SURPLUS

CURRENT LIABILITIES

Accounts payable	$ 5,558,420.67
Accrued taxes, insurance, royalties, and interest	1,195,005.79
Federal, state, and dominion taxes on income — estimated	9,383,101.17
TOTAL CURRENT LIABILITIES	$16,136,527.63

LONG-TERM DEBT

Serial notes payable, maturing $1,500,000.00 annually July 1, 1953, to 1956, inclusive, and $4,000,000.00 on July 1, 1957, interest 3%	10,000,000.00

CAPITAL STOCK AND SURPLUS

Capital stock:			
Common without par value:			
Authorized 3,000,000 shares			
Outstanding including treasury shares, 2,291,330 shares			
Stated capital		$ 5,728,325.00	
Capital surplus		26,875,642.41	
		$32,603,967.41	
Earned surplus (includes $3,023,780.35 of surplus of Canadian subsidiary)	$37,387,789.87		
Less 11,092 treasury shares, at cost (including 9,261 shares reserved for sale to certain officers and key employees)	253,105.87	37,134,684.00	69,738,651.41
			$95,875,179.04

Note — Assets of Canadian subsidiary included herein comprise net current assets and miscellaneous other assets, $2,110,591.31, after adjusting for exchange at October 31, 1951, and property, plant, and equipment, $585,454.62, at cost to the subsidiary.

Consolidated Income and Surplus

THE GLIDDEN COMPANY AND SUBSIDIARIES

Fiscal year ended October 31, 1951

INCOME

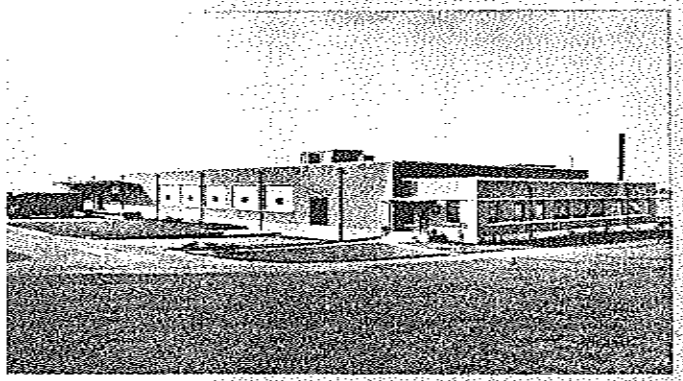
Net sales		$228,522,503.18
Cost of goods sold, selling, administrative and general expenses, including provision of $1,730,546.56 for depreciation and depletion		212,614,663.72
		$ 15,907,839.46
Other income		427,181.71
		$ 16,335,021.17
Interest expense		334,152.81
INCOME BEFORE TAXES ON INCOME		$ 16,000,868.36
Taxes on income—estimated:		
Federal normal income tax and surtax	$7,230,000.00	
Dominion and state taxes	457,000.00	7,687,000.00
CONSOLIDATED NET INCOME		$ 8,313,868.36

Note A — Consolidated net income includes $346,435.83 for the Canadian subsidiary representing that subsidiary's net income for the year after giving effect to adjustment of its net current assets and miscellaneous other assets to rate of exchange at October 31, 1951.

SURPLUS

CAPITAL SURPLUS		
Balance at November 1, 1950		$ 17,732,104.40
Add credit arising from conversion of convertible preferred 4½% cumulative $50.00 par value shares, to common shares without par value		9,143,538.01
BALANCE AT OCTOBER 31, 1951		$ 26,875,642.41
EARNED SURPLUS		
Balance at November 1, 1950		$ 33,988,203.01
Add net profit for the fiscal year		8,313,868.36
		$ 42,302,071.37
Deduct dividends paid:		
Convertible preferred — $2.25 per share	$ 402,154.75	
Common — $2.25 per share	4,512,126.75	4,914,281.50
BALANCE AT OCTOBER 31, 1951		$ 37,387,789.87

One of the newest and most modern of The Glidden Company's facilities is this Durkee's Margarine plant at Macon, Georgia.



PAINT

The Glidden Company, Cleveland, Ohio
The A. Wilhelm Company, Reading, Pennsylvania
The American Paint Works, New Orleans, Louisiana
The Campbell Paint & Varnish Company, St. Louis, Missouri
The Glidden Company, Minneapolis, Minnesota
Nubian Paint & Varnish Co., Chicago, Illinois
The Glidden Company, Ltd., Toronto, Ontario, Canada
The Glidden Company, San Francisco, California
Adams & Elting Company, Chicago, Illinois

FOOD

Durkee Famous Foods, Elston Avenue, Chicago, Ill.
Durkee Famous Foods, Iron Street, Chicago, Illinois
Durkee Famous Foods, Norwalk, Ohio
Durkee Famous Foods, Portland, Oregon
Durkee Famous Foods, Louisville, Kentucky
Durkee-McCadam, Cambridge, Massachusetts
Durkee Famous Foods, Berkeley, California
Durkee Famous Foods, Elmhurst, Long Island, N. Y.
Durkee Famous Foods, Macon, Georgia

CHEMICALS, PIGMENTS AND METALS

The Glidden Company, Chemical & Pigment Division, St. Helena (Baltimore), Maryland
The Glidden Company, Chemical & Pigment Division, Collinsville, Illinois
The Glidden Company, Chemical & Pigment Division, Oakland, California
The Glidden Company, Chemical & Pigment Division, Hammond, Indiana
The Glidden Company, Besson Lead Division, Scranton, Pennsylvania

SOYA PRODUCTS

The Glidden Company, Chicago, Illinois
The Glidden Company, Indianapolis, Indiana
The Glidden Company, Buena Park, California

NAVAL STORES

The Glidden Company, Jacksonville, Florida
The Glidden Company, Valdosta, Georgia
E. W. Colledge, General Sales Agent, Inc., Jacksonville, Florida

FEED MILL

The Glidden Company, Indianapolis, Indiana

VEGETABLE OILS

The Glidden Company, Buena Park, California
The Glidden Company, Chicago, Illinois
The Glidden Company, Portland, Oregon

MINES

Glidden Consolidated Zinc Mine, Shasta County, California
The Glidden Company, Barytes Mines, Battle Mountain, Nevada
The Glidden Company, Yadkin Mica & Ilmenite Mines, Lenoir, North Carolina

Retail Stores and Warehouses in the Principal Cities

AFFILIATED CORPORATIONS

Growth Products Company, Pascagoula, Mississippi
Jacksonville Processing Corporation, Jacksonville, Florida

Accountants Report

ERNST & ERNST

CLEVELAND

1140 COMMERCE BUILDING

Board of Directors,
The Glidden Company,
Cleveland, Ohio.

We have examined the consolidated balance sheet of The Glidden Company and subsidiaries as of October 31, 1951, and the related statements of consolidated income and surplus for the fiscal year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying balance sheet and statements of income and surplus present fairly the consolidated financial position of The Glidden Company and subsidiaries at October 31, 1951, and the consolidated results of their operations for the fiscal year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

ERNST & ERNST
Certified Public Accountants

Cleveland, Ohio
December 14, 1951

DIVERSIFIED PRODUCTS BY GLIDDEN

FOODS
Durkee's Grade AA Margarine
Durkee's Mayonnaise
Durkee's Whipped Salad Dressing
Durkee's Shortening
Durkee's Bakers Margarine
Durkee's Coconut
Durkee's Spices and Extracts
Durkee's Famous Dressing
Durkee's Worcestershire Sauce
Special Ingredients for Bakers and Confectioners

SOYBEAN PRODUCTS
Alpha* Protein
Prosein*
Soya Meal — Flour — Flakes
Lecithin
Fine Chemicals — Steroids
Soya Sterols
Cortical and Sex Hormones
Edible Emulsifiers

LIVE STOCK AND POULTRY FEEDS
Glidden Cattle and Hog Feeds
Glidden Poultry Feeds
Glidden Feed Concentrates

PAINTS, VARNISHES AND LACQUERS
SPRED SATIN
SPRED Flat
SPRED Luster
Endurance* House Paint
Endurance* Imperial House Paint
Japalac*
Ripolin* Enamel
Spray-Day-Lite
Brush-Day-Lite
Speed-Wall*
Gliddenspar Varnish
Florenamel
Pli-namel
Glidair Aviation Finishes
Nubelite
Nubelon
Glid-Tone Stains
Industrial Paints, Lacquers, Enamels and Varnishes

VEGETABLE OILS
Soybean Oils
Cottonseed Oils
Coconut Oils
Peanut Oils
Corn Oils
Palm Oils
Linseed Oils

CHEMICALS AND PIGMENTS
Zopaque* Titanium Dioxide
Sunolith* Lithopone
Cadmolith* Cadmium Colors
Euston* White Lead
Bleached Barytes
Copperas
Zinc Sulphate Crystals
Coal Tar Products

METALS AND MINERALS
Powdered Copper and Lead
Cuprous Oxide
Cupric Oxide
Cubond* Brazing Compound
Barite
Ilmenite

NAVAL STORES
Nelio* Rosin
Sunny South* Turpentine
Pigmentar (Pine Tar)
Alpha Pinene
Guai-a-phene*
Glidcol Anti-Skinning Agents
Terpene Chemicals
Camphene
Rosin Oils
Gloss Oils
Terpex
Meres Metal Resinates
Pine Wood Charcoal
Rubber Compounding Agents

*Trade Mark Registered

Much of The Glidden Company's business comes from the processing and production of raw materials for sale to other industries.

QUALITY Glidden PRODUCTS

ATTACHMENT C

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 17, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Andrias, Moskowitz, Manzanet-Daniels, JJ.

13117-
13118-
13119-
13120-
13121 Index 600920/08

Millennium Holdings LLC,
Plaintiff,

The Northern Assurance Company
of America,
Plaintiff-Appellant,

Certain Underwriters at
Lloyd's, et al.,
Intervenor Plaintiffs-Appellants,

-against-

The Glidden Company, now known
as Akzo Nobel Paints, et al.,
Defendants-Respondents.

_____

Zuckerman Spaeder LLP, Washington, D.C. (Jason M. Knott of the bar of the District of Columbia, admitted pro hac vice, of counsel), for appellants.

Debevoise & Plimpton LLP, New York (Maura K. Monaghan and James Amler of counsel), for respondents.

_____

Upon remittitur from the Court of Appeals (27 NY3d 406 [May 5, 2016]), order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 26, 2013, which granted

defendants the Glidden Company, now known as Akzo Nobel Paints LLC and Akzo Nobel Paints LLC's (collectively ANP), motion for summary judgment dismissing the complaint, modified, on the law, to remand for a limited determination of whether the insurers are entitled to recover defense costs as against ANP on the basis of express subrogation, and otherwise affirmed, without costs.

Background

The Original Glidden and SCM

The original Glidden was an Ohio corporation that manufactured and sold lead-based paints and coatings. In 1924, Glidden acquired Euston Lead Company, a producer of lead pigments used in paints. The lead pigment was a key ingredient in Glidden's lead paint, which was sold under the Glidden name for four decades. In 1958, Glidden sold the lead pigment operation to Dumont Airplane and Marine Instruments, Inc. and exited the lead pigment business. Within several years it stopped selling paint containing lead.

In 1967, Glidden was acquired by and merged into SCM Corporation. Glidden's paint business was housed in SCM's Glidden-Durkee Division. In 1976, the paint business was transferred to the Coatings & Resins Division. The pigments business – limited to non-lead pigments following the sale of Euston – was placed in the chemical/metallurgical division of

SCM.

The Insurance Policies

Certain Underwriters at Lloyd's, London and certain London market insurance companies (London), subscribed to primary and excess policies in favor of Glidden and SCM's Glidden-Durkee Division for the period from 1962 to 1970. Plaintiff Northern Assurance Company of America's predecessor issued an excess policy to SCM for the period June 27, 1968 to January 1, 1970. The policies covered liability for property damage sustained during the policy period. The primary policy issued between 1965 and 1968, to which the excess policies followed form, contained the following express subrogation clause:

> "Subrogation: Upon payment of any claim, demand, suit or judgment covered hereby the Underwriters (or other insurers or the Assured in the event that more than one insurer or the Assured as self-insurer has paid any part of such claim it being understood that other insurance or excess insurance or self-insurance is permitted) shall be subrogated to all rights which the Assured may have against any and every person, partnership or corporation in respect of such claim, demand, suit or judgment. . ."

Hanson Acquisition

In 1985, Hanson Trust PLC attempted a hostile takeover of SCM. As part of an effort to thwart the takeover, SCM in September 1985 transferred the assets of the domestic pigments

business to ABC Chemicals, a newly-formed and wholly-owned subsidiary of SCM.

In 1986, Hanson succeeded in acquiring SCM in a hostile takeover. The plan of liquidation and dissolution distributed the company's remaining assets and liabilities among 20 "fan companies" known as HSCM 1 through 20. The paints, resins, coatings, caulking and adhesives business (i.e., the Coatings & Resins Division) was transferred to HSCM-6. The memorandum of distribution in liquidation between SCM and HSCM-6 provided that "HSCM-6 hereby assumes all of the obligations and liabilities relating to the Business, including all claims, whether asserted or unasserted, known or unknown, contingent or otherwise . . . attributable to all periods prior to the date hereof."

By another memorandum of distribution in liquidation, SCM distributed to HSCM-20 the assets "constitut[ing] all the remaining assets of SCM" that had not been transferred to other fan companies. Those assets included the stock of the new fan company subsidiaries, as well as the stock of ABC Chemicals, which then owned the pigments business. HSCM-20 assumed all of the obligations and liabilities related to such assets.

Thus, HSCM-20 separately owned both SCM's paint business (HSCM-6) and SCM's pigment business (ABC Chemicals).

Asset Purchase Agreement

Shortly thereafter, HSCM-20 sold HSCM-6 to ICI American Holdings, a subsidiary of Imperial Chemical Industries, PLC. The sale was memorialized in a purchase agreement dated August 14, 1986. HSCM-6 was later renamed "The Glidden Company," the predecessor of defendant ANP herein.

Under the asset purchase agreement, Millennium Holdings LLC and its predecessors were required to indemnify ANP and its predecessors from 1986 through 1994 for liabilities arising out of or resulting from "environmental events or environmental conditions" resulting from the use, manufacture, handling, etc., of "materials, substances or wastes in, about or relating to the Business, including, without limitation, the paints, coatings, resins, adhesives, caulkings or related businesses owned or held by any predecessor entity ('Predecessor Business') or formerly owned or held by Seller, HSCM-6, any of the Subsidiaries or any predecessor of any of the foregoing ('Former Business'), and to indemnify ANP in respect of any personal injury or property damage claims of or relating to the Business, the Predecessor Business or the Former Business."

ANP and its predecessors were required to indemnify Millennium and its predecessors thereafter "against and in respect of [claims] . . . relating to the Business arising from

or relating to acts, omissions, events or conditions of or relating to the Business, the Predecessor Business or the Former Business occurring or existing prior to, on or after the Closing or otherwise arising out of or relating to the conduct of the Business, the Predecessor Business or the Former Business . . . for matters referred to in Section 9.1(b)[i.e., environmental liabilities], 9.1[c] [i.e., personal injury and property damage claims], and 9.1(e) [i.e., other claims]."

Lead Paint Litigation

Beginning in 1987, a number of lawsuits were filed against ANP (the paint company) and Millennium (the pigment company), alleging property damage, personal injuries, and/or public nuisance arising from the presence of old lead paint in inner city housing.

From 1986 onward, Millennium indemnified ANP in accordance with the asset purchase agreement. Shortly before the end of Millennium's indemnification period, a dispute arose as to the scope of ANP's obligations (scheduled to commence in 1994 under the terms of the asset purchase agreement). ANP argued that it was not obligated to provide Millennium with indemnification for "pigment cases," but rather, only paint cases, contending that "pigment cases" fell outside the scope of the indemnity.

The dispute led to litigation in Ohio (*Glidden Co. v HM*

Holdings, Case. No. 269218, Ohio Court of Common Pleas 1994) and New York (*HM Holdings, Inc. v ICI American Holdings and The Glidden Company*, Index No. 110533/94, Sup Ct, NY County 1994). Both litigations were settled in 2000 with the parties executing an amended purchase agreement. Millennium assumed the rights and obligations of HSCM-20, including the pigment business, and ANP assumed the rights of ICI and ICI American (HSCM-6), including the paint business. The settlement left open the parties' indemnification obligations regarding the lead paint cases.

Between 1995 and 2000, the insurers paid defense costs for and on behalf of both Millennium and ANP for their joint defense of the lead litigation cases. The insurers terminated funding in 2000 and sought a declaration in Ohio state court that they were not required to provide ANP with a defense and indemnification in the lead cases. In 2006, the Ohio Supreme Court held that ANP was not covered under the relevant policies since it was not a named insured and was not the corporate successor to HSCM-20, the entity holding the policies following the liquidation and distribution of SCM's assets (*Glidden Co. v Lumbermens Mut. Cas. Co.*, 112 Ohio St 3d 470, 861 NE2d 109 [2006]).

The insurers entered into a new defense funding agreement with Millennium only. In 2011, the insurers paid $3.2 million to Millennium toward the settlement of an action brought by the

State of California alleging that a public nuisance had been created by the presence of lead paint in California buildings (the "Santa Clara action"). The insurers' payment in the Santa Clara action was made pursuant to a full reservation of rights, including the right to seek reimbursement from Millennium if there were no coverage. The insurers then brought a coverage action in Ohio seeking a declaration that the Santa Clara action was not covered by the policies. In an order entered August 8, 2013, the trial court in Ohio ruled in favor of the insurers, ruling that the Santa Clara action was not covered by the policies. The court reasoned that "whether property damage occurred or not by the Millennium Plaintiffs' product [wa]s irrelevant," since the California Court of Appeals had ruled that property damage was not an element of the claim for public nuisance, eliminating any possibility that Millennium would be held liable for property damage. The court declined to adopt a "continuous trigger" theory of recovery (which would have implicated more years of policy coverage). The court declined to permit the insurers to recover the $3.2 million payout from Millennium, finding that an insurer could not create a right to reimbursement from its insured based solely on a unilateral reservation of a right to seek repayment over an explicit objection by the insured (*see Millennium Holdings LLC v*

Lumbermens' Mut. Cas. Co., Case No. 00-CV-411388,*8-11 [Cuyahoga County 2013]).

The Instant Litigation

In 2008, Millennium commenced this action seeking indemnification from ANP for fees and claims associated with the lead cases. The insurers' motions to intervene in the action were granted. In 2010, Millennium declared bankruptcy and settled its dispute with ANP. The settlement preserved the insurers' subrogation rights.

Following the settlement in the Santa Clara action, the London insurers sought a declaration that they were entitled to subrogate (both equitably and contractually) to Millennium's indemnification rights in the 1986 asset purchase agreement and to recover from ANP amounts they had paid on behalf of Millennium in connection with the lead paint cases.

The insurers moved for partial summary judgment on liability, asserting that they were entitled to recover the $3.2 million payment they had made toward settlement of the Santa Clara action, as well as defense costs incurred in other lead paint litigations. ANP cross-moved for summary judgment dismissing the complaint on the ground, inter alia, that the insurers' subrogation claim was barred by the antisubrogation rule.

The motion court denied the insurers' motion and granted ANP's motion. The motion court reasoned that while ANP was obligated to indemnify Millennium for its losses related to the lead paint litigations, the "anti-subrogation rule" precluded the insurers from recovering from ANP the payments the insurers had made on Millennium's behalf. The court reasoned that the insurers, by seeking to enforce their subrogation rights against ANP, were seeking to recover for the very risk they had insured in the underlying lead cases. We affirmed (121 AD3d 444 [1st Dept 2014]).

The Court of Appeals reversed (27 NY3d 406 [2016]). Justice Abdus-Salaam, writing for the Court, reasoned that since ANP and its predecessor were not insured under the relevant insurance policies (as noted, *supra*, the insurance policies were transferred to HSCM-20, the predecessor to Millennium, and not HSCM-6, the predecessor to ANP), "the principal element for application of the antisubrogation rule -- that the insurer seeks to enforce its right of subrogation against its own insured, additional insured, or a party intended to be covered by the insurance policy" -- was absent (27 NY3d at 416). The Court remitted the matter for consideration of issues raised but not determined on the prior appeal. Those issues include whether the insurers have a right to subrogate to Millennium's

indemnification rights as set forth in the asset purchase agreement, the scope of any such indemnification obligation, and whether the insurers' payment in the Santa Clara action is barred by the voluntary payment doctrine.

Discussion

Subrogation

The right to equitable subrogation accrues when an insurer can establish that it has paid for "losses sustained by its insured that were occasioned by a wrongdoer" (*Fasso v Doerr*, 12 NY3d 80, 86 [2009]; *Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577 [1995]).

The insurers argue that they have a right to equitably subrogate to Millennium's rights under the indemnification, relying on *National Sur. Co. v National City Bank of Brooklyn* (184 App Div 771 [1st Dept 1918]); ANP disagrees, asserting that under New York law a party may not proceed by way of equitable subrogation against a third party whose liability exists by way of contract.

We are compelled to agree with ANP. The Court of Appeals distinguished *National Sur. Co.* in *Federal Insurance Co. v Arthur Andersen & Co.* (75 NY2d 366 [1990]), stating "arguably a compensated insurer or surety should in fairness bear the loss where the third party's liability is solely contractual and not

based on fault" (*id.* at 377; *see also National Union Fire Ins. Co. v Ranger Ins. Co.*, 190 AD2d 395, 398 [4th Dept 1993] ["because National attempts to assert a right to equitable subrogation against Ranger, a third party that was not negligent and did not cause El Kam's loss, based solely on Ranger's contractual liability," the doctrine of equitable subrogation did not apply]).

ANP is not a third-party wrongdoer, but a party whose liability arises by contract. The insurers accordingly may not rely on a theory of equitable subrogation to pursue claims against ANP.

Contractual Subrogation

A possible theory of liability – but only as to those policies in effect from 1965 to 1968 which contain an express subrogation clause – is contractual subrogation.

The parties dispute the meaning and scope of the relevant indemnification provisions of the asset purchase agreement. The insurers assert that the indemnity extends to the lead paint litigations; ANP asserts that the indemnification was never intended to cover so-called "pigment," as opposed to "paint," cases.

A court will not find a duty to indemnify unless a contract manifests "a clear and unmistakable intent to indemnify" for

particular liabilities (*Commander Oil Corp. v Advance Food Serv. Equip.*, 991 F2d 49, 51 [2d Cir 1993] [internal quotation marks omitted]). The indemnity obligation will be strictly construed, and additional obligations may not be imposed beyond the explicit and unambiguous terms of the agreement (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]).

The indemnification provisions of the agreement define "predecessor" and "former" businesses broadly as "the paints, coatings, resins, adhesives, caulkings or related businesses owned or held by any predecessor entity" ('Predecessor Business') or formerly owned or held by Seller, HSCM-6, any of the Subsidiaries or any predecessor of any of the foregoing ('Former Business')."

The indemnification on its face does not purport to distinguish between pigment and paint-based liabilities in the manner suggested by ANP. While the pigment/paint distinction was of concern in the underlying litigations, the indemnity provisions were likely drafted broadly because the eventual liabilities of the corporate successors could not be contemplated with certainty. Indeed, as the motion court observed, "The bottom line is that the paint contained lead, and it was the lead that caused personal injuries, property damage, and public nuisances, not the 'paint' or the 'pigment'" (41 Misc3d 1231[A],

*6, 2013 NY Slip Op 51947[U]).

This does not end the inquiry, however. An indemnification provision must be read in conjunction with the other provisions of the agreement (*see Promuto v Waste Mgt., Inc.*, 44 F Supp 2d 628, 650 [SD NY 1999]). The asset purchase agreement as a whole contemplates that Millennium will maximize its insurance coverage before seeking indemnity from ANP, and that ANP will receive the benefits of Millennium's coverage under the policies. The subject policies, let us not forget, are occurrence policies that cover liabilities arising when both companies were owned by the same parent, SCM.

The side letter agreement provides that "Hanson shall give ICI [predecessor to ANP] and its subsidiaries the benefit of any policy of insurance to the extent the same would provide coverage for liability in respect of occurrences relating to the Business prior to Closing giving rise to loss, injury or damage thereafter subject to indemnity on costs." This provision would arguably be rendered meaningless if ANP were required to repay the insurers through subrogation.

Section 2 of the lead litigation agreement (incorporated by reference into the asset purchase agreement) includes an express undertaking by Millennium to share with ANP insurance proceeds relating to litigation conducted in the common defense, to assign

ANP choses in action for insurance coverage, and to "use [its] best efforts to maximize any and all insurance recoveries under the Insurance Policies."[1]

The Ohio Supreme Court's ruling that the side letter agreement did not cause the paint company (now ANP) to maintain coverage under the subject insurance policies answers the question of whether ANP could seek payment directly from the insurers. It does not address the present situation, where the insurers seek to proceed against ANP via subrogation and we are asked to construe the meaning of an indemnification agreement. The Ohio Supreme Court did not "invalidate" the side letter agreement in the manner suggested by the partial dissent; rather, it held that the parent company had not effectuated a transfer of insurance coverage on behalf of its subsidiary.

Given the ambiguities in the relevant agreements, we cannot find as a matter of law that the insurers are entitled to contractually subrogate to ANP's indemnification rights. On remand, the motion court is to consider the intent of these provisions in light of the extrinsic evidence.

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[1]Although this agreement was terminated in 2002, it extends to defense costs in respect of claims that were incurred prior to the effective date of the termination. Further, it does not address the question of whether ANP agreed to pay Millennium's insurers.

Voluntary Payment

The insurers' payment of $3.2 million to Millennium on account of the Santa Clara action was a "voluntary payment" precluding the exercise of the insurers' subrogation rights. It is axiomatic that a right of subrogation exists only for payments an insurer is contractually obligated to pay (*see Broadway Houston Mack Dev., LLC v Kohl*, 71 AD3d 937 [2d Dept 2010]). The Ohio court having already determined that the Santa Clara action is outside the scope of the policy coverage, the insurers have no right to recover the payment made on behalf of their insured (*see National Union Fire Ins. Co. v Ranger Ins. Co.*, 190 AD2d at 397-399). At the time the payment was made, the insurer was not acting under any mistake of fact or law (*see id.*) Thus, the insurer became a mere volunteer, and the $3.2 million paid is outside the scope of any right to subrogation (*see Broadway Houston Mack Dev., LLC v Kohl*, 71 AD3d at 937-938).

The fact that ANP did not plead the voluntary payment doctrine as an affirmative defense is irrelevant. Proof that the payment was legally compelled was part of the insurers' prima face case to establish a right to subrogation (*see id.*).

Conclusion

The insurers are not entitled to proceed by way of equitable subrogation. The insurers may not recover the $3.2 million

payment in settlement of the Santa Clara action. On remand, the motion court is to construe the relevant indemnification obligations set forth in the asset purchase agreement and to determine whether the insurers may proceed on a contractual subrogation theory with respect to those policies containing an express subrogation clause (1965-1968).

All concur except Sweeny, J.P. and Andrias, J. who dissent in part in a memorandum by Andrias, J. as follows:

ANDRIAS J. (dissenting in part)

Appellant insurance companies claim that they are entitled to be subrogated (both equitably and contractually) to the right of their insured, plaintiff Millennium Holdings LLC (Millennium), to indemnification from defendant the Glidden Company, now known as Akzo Nobel Paints (ANP), for the amounts they expended on behalf of Millennium in certain lead paint related cases.[1] While agreeing with the insurers that the contractual indemnity provision at issue applies, the motion court granted summary judgment to ANP on the ground that the insurers' claims were barred by the antisubrogation rule because they sought to recover for the very risk they insured (*see* 41 Misc 3d 1231[A], 2013 NY Slip Op 51947 [U]). This Court affirmed for the reasons stated by the motion court (*see* 121 AD3d 444 [1st Dept 2014]). The Court of Appeals reversed and remitted to this Court for consideration of issues raised but not determined on the appeal, holding that the antisubrogation rule did not apply to a claim against ANP, a related successor company that was never an insured (*see* 27 NY3d 406 [2016]).

On remittitur, I agree with the majority that the insurers may not proceed by way of equitable subrogation against ANP, a

[1]Millennium and ANP have settled their claims in this action against each other.

third party whose liability exists by way of contract, and that the insurers' payment of $3.2 million to settle the "Santa Clara" action was a "voluntary payment," precluding the exercise of the insurers' subrogation rights with respect thereto. However, I do not agree with the majority that the matter should be remanded to Supreme Court for a limited determination of whether the insurers are entitled to recover defense costs as against ANP on the basis of an express subrogation agreement. Contrary to the view of the majority, the indemnity agreement is not ambiguous and supports the insurers' claim for indemnification for defense costs with respect to policies that contain a subrogation clause.

The original Glidden Company (Old Glidden) manufactured and sold lead paints and lead pigments used in paints. In 1958, it stopped manufacturing lead pigment, but continued to manufacture and sell paint containing lead. In 1967, it was acquired by and merged into SCM Corporation (SCM), which placed the paint business into its "Glidden-Durkee" division. Between 1962 and 1970, primary and excess insurance policies were issued to Old Glidden and the Glidden-Durkee division by the insurers or their predecessors for property damage liability arising from lead in their products. The policies in effect from 1965-1968 contained a subrogation clause.

In 1985, SCM transferred its pigments business (which no

longer involved lead) to a new subsidiary, ABC Chemicals Inc. (ABC). In 1986, Hanson Trust PLC (Hanson) acquired SCM, whose assets and liabilities were transferred to 20 "fan companies," entitled HSCM 1 through 20. The paint business went to HSCM-6 but the insurance policies were excluded from the transfer. The stock of HSCM-6 and all remaining undistributed assets of SCM were placed in HSCM-20, including ABC and the insurance policies.

In 1986, HSCM-20 sold the stock in HSCM-6 to ICI American Holdings (ICI) (the 1986 agreement). HSCM-20 retained the insurance policies. Under section 9.1(c) of the 1986 agreement, HSCM-20 agreed to indemnify ICI for an eight-year period between 1986 and 1994 for claims arising from

> "product safety or liability ..., health or welfare conditions or matters arising from or relating to acts, omissions, events or conditions of or relating to the Business, the Predecessor Business or the Former Business occurring or existing prior to the Closing or otherwise arising out of or relating to the conduct of the Business, the Predecessor Business or the Former Business prior to the Closing."

After 1994, the indemnification obligation flipped, with section 9.3 providing that ICI would indemnify HSCM-20

> "from, against and in respect of any Claims ... relating to the Business arising from or relating to acts, omissions, events or conditions of or relating to the Business, the Predecessor Business or the Former Business occurring or existing prior to, on or after the Closing or otherwise arising out of or relating to the conduct of the Business, the Predecessor Business or the Former Business prior to, on or after the

> Closing arising against Indemnitees for matters referred to in Section 9.1(b), 9.1(c) or 9.1(e) to the extent that [ICI] would not be entitled to indemnity under Sections 9.1 [4] and 9.2.[5]."

Hanson and ICI also entered into a side Letter Agreement that provided that "Hanson shall give ICI and its subsidiaries the benefit of any policy of insurance to the extent the same would provide coverage for liability in respect of occurrences relating to the Business prior to Closing giving rise to loss, injury, or damage thereafter subject to indemnity on costs."

In 1987, multiple lead paint lawsuits were filed against the predecessors of Millennium and ANP. Between 1987 and 1994, Millennium's predecessors indemnified ANP's predecessors for defense costs pursuant to section 9.1(c) of the 1986 agreement. In 1994, when the indemnity obligation flipped, ANP's predecessor (ICI) refused to indemnify Millennium's predecessors (Hanson and HSCM-20), resulting in litigation between them in New York and Ohio state courts.

In 2000, that litigation settled. Pursuant to a settlement agreement and three additional agreements attached as exhibits thereto, including "The Lead Litigation Agreement," an Amended Purchase Agreement (APA) was formed under which Millennium assumed the rights and obligations of Hanson and HSCM-20 and ANP assumed the rights and obligations of ICI. Accordingly, the

pigment business went to Millennium and the paints business went to ANP. Further, in the Lead Litigation Agreement, the parties agreed to continue their prior practice of sharing equally the costs associated with defending lead litigation cases in which both parties were defendants, without prejudice to later indemnification claims.

Subsequently, the London Insurers terminated that agreement and sought a declaration in Ohio state court that they were not required to provide ANP with a defense and indemnification. In 2006, the Ohio Supreme Court held that ANP was not covered under the relevant policies "by operation of law or by contract," as it was not a named insured and its subsequent purchase of HSCM-6 included an assumption of liabilities (*see Glidden Co. v Lumbermens Mut. Cas. Co.*, 112 Ohio St 3d 470, 470, 474-475, 861 NE2d 109, 112, 115-116 [2006]). The decision also invalidated Hanson's side letter agreement attempting to provide ANP's predecessor ICI with the benefits of SCM's insurance policies on the ground that Hanson was not a named insured in the relevant policies and consequently could not transfer them to ICI.

Stating that there is a distinction between "paint cases" and "pigment cases," ANP contends that section 9.3 of the 1986 agreement only applies to "paint cases" since its indemnification obligation was limited to "Claims relating to the Business," and

the term "Business" did not refer or relate to the "pigment" business.[2] However, as the majority finds, the plain language of the agreement refutes ANP's arguments.

Section 9.1(c), identifying the scope of Millennium's indemnification obligations, and section 9.3, identifying the scope of ANP's indemnity obligation, employ substantially similar language and reflect an intent to have the indemnity cover all facets of "The Business," i.e., anything relating to the "developing, manufacturing, marketing, selling, [licensing] and distributing of paints, industrial coatings, resins, caulkings, and adhesives." Moreover, section 9.4, states that, notwithstanding the "foregoing," with respect to any claim "incurred or suffered as a result of any Claim arising out of or in any way related to exposure to materials, substances, wastes, or products manufactured, used, stored, sold, handled, spilled discharged or disposed of by" ANP, or "any of the Subsidiaries or any predecessor entity of the foregoing ... (iii) if the Claim for exposure becomes first pending later than 8 years after Closing, Buyer [ANP's predecessor] shall indemnify the Indemnitees [Millennium's predecessor] in full." This language

[2]As the motion court observed, it appears that the plaintiffs in lead paint cases eventually made the decision to only maintain their cases against pigment companies.

indicates that after eight years, the period of 1986-1994, ANP's indemnification obligation was to be as broad as Millennium's was prior to that time. If the parties intended for "paint" claims to be paid for by the "paint" company (then HSCM-6, now ANP) and for "pigment" claims to be paid for by the "pigment" company (then ABC, now Millennium), the agreement could have just said so.

While agreeing that "[t]he indemnification on its face does not purport to distinguish between pigment and paint-based liabilities in the manner suggested by ANP," the majority nevertheless holds that ambiguities in the relevant agreements preclude a finding that the insurers are entitled, as a matter of law, to contractually subrogate to Millenium's indemnification rights. In support, stating that the indemnification must be read in conjunction with the other provisions of the relevant agreements, the majority asserts that: (1) the 1986 agreement as a whole "contemplates that Millennium will maximize its insurance coverage before seeking indemnity from ANP, and that ANP will receive the benefits of Millennium's coverage under the policies"; (2) the side letter agreement that provides that ICI (ANP's predecessor) would receive the benefits of the insurance policies "would arguably be rendered meaningless if ANP were required to repay the insurers through subrogation"; and (3)

section 2 of the Lead Defense Agreement "includes an express undertaking by Millennium to share with ANP insurance proceeds relating to litigation conducted in the common defense, to assign ANP choses in action for insurance coverage, and to 'use [its] best efforts to maximize any and all insurance recoveries under the Insurance Policies.'" However, none of these three points preclude summary judgment on the issue.

Whether a contract is ambiguous is a question of law for the court and is to be determined by looking "within the four corners of the document" (*Kass v Kass*, 91 NY2d 554, 566 [1998]; *Omansky v Whitacre*, 55 AD3d 373 [1st Dept 2008]). The existence of ambiguity is determined by examining the "entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed," with the wording to be considered "in the light of the obligation as a whole and the intention of the parties as manifested thereby" (*Kass* at 566 [internal quotation marks omitted]).

"A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [internal quotation marks omitted]). A contract is ambiguous if

its terms are "susceptible to more than one reasonable interpretation" (*Evans v Famous Music Corp.*, 1 NY3d 452 [2004]). "[P]rovisions in a contract are not ambiguous merely because the parties interpret them differently" (*Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 352 [1996]).

ANP's obligation to indemnify Millennium for the defense cost under section 9.3 of the 1986 agreement is not ambiguous. Further, the Court of Appeals' determination in this matter shows that neither the side letter nor any other document conferred insurance rights upon ANP.

The side letter agreement does not immunize ANP from liability for costs that the insurers paid to or on behalf of Millennium. Nothing in the letter, or in the 1986 agreement itself, states that the indemnity is ineffective to the extent that Millennium is able to obtain insurance coverage for the amounts owed by ANP; that Millennium cannot pursue indemnity for covered amounts; or that subrogation claims by insurers for those amounts are waived. Indeed, the Ohio Supreme Court held that the side letter did not convey any rights related to the policies, because Hanson had no rights to give (*see Glidden Co. v Lumbermens Mut. Cas. Co.*, 112 Ohio St 3d at 477, 861 NE2d at 117). Millennium terminated the Lead Litigation Agreement, and told ANP at that time that it would no longer share insurance

recoveries even if ANP had agreed to indemnify it for a claim.

Accordingly, I would deny ANP summary judgment insofar as the insurers seek to recover the defense costs.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 17, 2017

CLERK

ATTACHMENT D

[Cite as *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553.]

THE GLIDDEN COMPANY, APPELLEE, *v.* LUMBERMENS MUTUAL CASUALTY COMPANY ET AL., APPELLANTS.

[Cite as *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553.]

An actual conflict between Ohio law and the law of another jurisdiction must exist before a choice-of-law analysis is undertaken — The doctrine of collateral estoppel cannot be invoked when there is no final order.

(No. 2005-0293 — Submitted December 14, 2005 — Decided December 20, 2006.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 81782, 2004-Ohio-6922.

SYLLABUS OF THE COURT

1. An actual conflict between Ohio law and the law of another jurisdiction must exist before a choice-of-law analysis is undertaken.
2. The doctrine of collateral estoppel cannot be invoked when there is no final order.

O'CONNOR, J.

{¶ 1} This is a discretionary appeal accepted as a case of great general interest pursuant to S.Ct.Prac.R. II(1)(A)(3). Appellants Lumbermens Mutual Casualty Company ("Lumbermens"), American Motorists Insurance Company ("AMICO"), Hartford Accident & Indemnity Company ("Hartford"), Century Indemnity Company ("Century," as successor to INA), Certain Underwriters at Lloyd's, London, and London Market Insurance Companies (collectively,

"London"), are putative insurers of appellee, the Glidden Company ("Glidden III"). We are asked to resolve the question of whether insurance coverage arises for Glidden III under commercial general liability policies issued by the appellants. For the reasons that follow, we hold that no coverage arose either by operation of law or by contract. Further, the appellants did not waive and were not collaterally or equitably estopped from offering the corporate-history defense that prevails here.

Facts and Procedural History

{¶ 2} On June 2, 2000, Glidden III filed suit seeking a declaratory judgment that the appellants are required to defend and indemnify Glidden III against a number of underlying lead-based paint actions that were first filed in 1987. These actions sought damages for injury from the manufacture and sale of lead paints from the 1960s to 1974. Glidden III came into existence in 1986 after a long history of corporate mergers.

{¶ 3} Glidden III claims that the insurance companies sold "occurrence" policies to companies no longer in existence and that therefore the insurance companies should defend Glidden III against claims made against it for those occurrences. The insurance companies assert that insurance contracts between them and the named insureds prohibited the transfer of rights under the policies and that they never issued contracts for insurance to Glidden III.

A. The Corporate History

{¶ 4} The court of appeals relied on the statement of facts contained in the trial court's grant of summary judgment in favor of the appellants. We reproduce it below as the primary source of the record in this matter:

{¶ 5} "A. Undisputed Corporate History and Relevant Facts

{¶ 6} "1. Pre-1987 Background

{¶ 7} "The original SCM Corporation (SCM (NY)) was a New York corporation from 1924 to 1986. SCM is the sobriquet for Smith/Corona/Marchant.

SCM (NY) is a named insured on the CGL policies at issue covering the period from April 1, 1967 to January 1, 1987.

{¶ 8} "The original 'The Glidden Company' ('Glidden I') was an Ohio corporation with its principal place of business in Cleveland, Ohio from 1917 to 1967. Glidden I was a manufacturer and seller of lead based paints and lead pigments used in paints. Glidden I was insured by London for property damage (1959-1967). Glidden I merged into SCM (NY) on September 22, 1967, which succeeded to the London policies previously issued to Glidden I. The former business operations of Glidden I were carried on through SCM (NY)'s subsidiaries or divisions. Thus, in 1968 Glidden I's acquired paint business became part of SCM (NY)'s Glidden-Durkee Division until 1976 when it was transferred to the Coatings & Resins Division, where it remained until 1986. In 1976, the former pigments part of the business was placed in the Chemical/Metallurgical Division of SCM (NY) where it remained until 1985. On September 6, 1985, SCM (NY) incorporated ABC Chemicals, Inc. as a wholly owned subsidiary and transferred to it the assets of the domestic pigments business.

{¶ 9} "Glidden I was a named insured on certain London policies for the period from 1959 to September 22, 1967 when it merged into SCM (NY). Upon the merger the London policy was endorsed to change the named insured to the Glidden-Durkee Division of SCM (NY) and coverage continued until January 1, 1970.

{¶ 10} "2. The Hanson Take-Over in 1986 and Sale to ICI

{¶ 11} "In January, 1986 HSCM Industries, Inc., a Delaware corporation and an indirect subsidiary of a British company known as Hanson Trust Plc, acquired control of SCM (NY) by a stock tender offer and implemented a plan of reorganization in order to sell off certain SCM (NY) businesses piece-meal. Thus, in May, 1986 HSCM Industries, Inc. was liquidated and stock ownership of SCM

(NY) was transferred to certain indirect subsidiaries of Hanson known as the 'fan companies' (HSCM-1, Inc. through HSCM-20, Inc.).

{¶ 12} "In May, 1986 SCM (NY) adopted a Plan of Liquidation and Dissolution pursuant to which SCM (NY) transferred specified assets and liabilities of its business units to the various fan companies which held its stock. On August 12, 1986, pursuant to the liquidation, SCM (NY) transferred its paints, resins, coatings, caulking and adhesives business (essentially the Coatings & Resins Division) to HSCM-6, Inc. Then on August 14, 1986, Hanson agreed to sell HSCM-6, Inc. to ICI American Holdings, Inc. ('ICI'). On August 22, 1986 HSCM-6 Inc.'s name was changed to The Glidden Company ('Glidden II').

{¶ 13} "The Purchase and Sale Agreement between Hanson and ICI called for a sharing of pre-closing (October 31, 1986) liabilities of the paint business. Hanson and ICI agreed that Hanson would retain ownership of all insurance policies, i.e. including the ones at issue herein. However, a side Letter Agreement of the same date provided that 'Hanson shall give ICI and its subsidiaries the benefit of any policy of insurance to the extent the same would provide cover for liability in respect of occurrences relating to the Business prior to Closing giving rise to loss, injury, or damage thereafter subject to indemnity on costs.'

{¶ 14} "Before the October 31, 1986 closing, ICI assigned its rights under the Purchase and Sale Agreement to two of its wholly owned subsidiaries, Atkemix Seven, Inc. and Atkemix Eight, Inc. On December 30, 1986, Glidden II (formerly named HSCM-6, Inc.) was liquidated and its assets distributed to Atkemix Seven and Atkemix Eight, after which Atkemix Eight was renamed 'The Glidden Company' ('Glidden III'). Glidden III acquired Atkemix Seven (then known as the Macco Company) in 1987.

{¶ 15} "3. SCM (NY) Since the Hanson Take-Over

{¶ 16} "On October 30, 1986 as part of the liquidation and dissolution of SCM (NY), the name of its subsidiary, ABC Chemicals, was changed to SCM Chemicals, Inc. ('SCM Chemicals'). On November 14, 1986, minus the assets and liabilities that had been transferred to the fan companies, SCM (NY) was merged into HSCM-20, Inc., a Delaware corporation, which was then renamed SCM Corporation ('SCM II'). On November 17, 1986 SCM II was merged into HSCM Holdings, Inc., another Hanson-controlled Delaware corporation, which then was renamed SCM Corporation ('SCM III').

{¶ 17} "On October 14, 1988 SCM III was merged into HM Holdings, Inc., another Hanson-controlled Delaware corporation. Thus SCM Chemicals became a subsidiary of HM Holdings, Inc. Almost eight years later, on September 30, 1996, Hanson sold HM Holdings, Inc.'s indirect parent, Hanson Overseas Holdings Limited, to a newly formed corporation, Millennium Chemicals, Inc. HM Holdings, Inc., the survivor, after merger with Millennium Holdings, Inc. was renamed Millennium Holdings, Inc. SCM Chemicals, which had been a subsidiary of Millennium Holdings, Inc. then changed its name to Millennium Inorganic Chemicals, Inc. in 1997.

{¶ 18} "On June 11, 2001 Millennium Chemicals incorporated a Delaware limited liability company named MHI 2, LLC. Two days later, on June 13, 2001, Millennium Holdings was merged into MHI 2, LLC which was renamed Millennium Holdings LLC, plaintiff herein."

The Insurance Policies

{¶ 19} Glidden I purchased policies from London covering the period from April 27, 1959, to April 27, 1968. After Glidden I merged into SCM (NY), the existing policy was endorsed to change the named insured to the "Glidden-Durkee Division of SCM Corporation," the division in which Glidden I was placed after the merger.

{¶ 20} SCM (NY) is the named insured on the policies issued by Lumbermens, AMICO, Century, and Hartford, covering April 1, 1967 to January 1, 1987. Glidden III came into existence in 1986. No appellant insurance company has issued a policy to Glidden III.

Procedural History

{¶ 21} After cross-motions for summary judgment, the trial court denied Glidden III's motion, granted the appellants' motion, and granted final judgment in favor of the appellants. The trial court, in its final order, ruled that collateral estoppel did not apply as the result of litigation in Pennsylvania from 1991 to 1995 between the parties, that Glidden III was not entitled to claim coverage under policies issued to SCM Corporation or any division thereof because it was not a corporate successor to SCM (NY), and that Glidden III was not an insured under any of the policies. It also determined that Ohio law should govern the analysis concerning certain early insurance policies and that New York law should govern the rest because the 1967 merger of Glidden I with SCM (NY) resulted in the relocation of Glidden I's corporate offices and operations to New York from Ohio. But the court also found that New York law and Ohio law did not diverge on the relevant issues.

{¶ 22} The Eighth District Court of Appeals affirmed in part and reversed in part, despite rendering the judgment "reversed and remanded." The court of appeals determined that collateral estoppel did not prevent the appellants from maintaining their defenses, but that Glidden III was an insured under the appellants' policies by operation of law. The court of appeals also held that Ohio law should apply to allocation of costs for a covered loss. It is this decision that we now reverse, and we hold that Glidden III is not entitled to coverage under any of the policies.

Analysis

{¶ 23} Appellants seek review of two determinations by the court of appeals. First, they argue that the court made an improper choice of law as to the allocation between the insurers and the decision that coverage arose by operation of law. Second, they argue that the court's determination that insurance coverage arose by operation of law under Ohio law is incorrect.

{¶ 24} We begin by noting that this court decided a nearly identical issue concerning whether insurance coverage arises by operation of law for a subsequent purchaser of corporate assets and liabilities in *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121. In *Pilkington*, we held, "[W]hen a covered occurrence under an insurance policy occurs before liability is transferred to a successor corporation, coverage does not arise by operation of law when the liability was assumed by contract." Id. at ¶ 61. Glidden III has assumed the liabilities in question by contract, so if Ohio law applies, insurance coverage does not arise by operation of law.

{¶ 25} We next turn to appellants' argument that the appeals court erred in not applying New York law.[1] We must begin by noting that several of the appellate courts in Ohio, including those addressing the claims in this case, have held that an actual conflict between Ohio law and the law of another jurisdiction must exist for a choice-of-law analysis to be undertaken. *Glidden Co. v. Lumbermens Mut. Cas. Co.*, Cuyahoga App. No. 81782, 2004-Ohio-6922, at ¶ 52; *Akro-Plastics v. Drake Industries* (1996), 115 Ohio App.3d 221, 224, 685 N.E.2d 246. The basis of this decision is contained in Restatement of the Law 2d, Conflict of Laws (1972), Section 1, Comment b: "Suppose that A injures B in state Y and B brings suit against A in state X to recover for his injuries. If the local law rules of X and Y differ in relevant respects, the X court may be called upon to decide whether to apply the rules of one state rather than the rules of the other." This rule is proper, and we adopt it here.

1. It is undisputed that for the pre-1967 policies, Ohio law applies.

{¶ 26} Appellants, citing *EM Industries, Inc. v. Birmingham Fire Ins. Co. of Pennsylvania* (1988), 141 A.D.2d 494, 529 N.Y.S.2d 121, assert that New York law rejects the general-operation-of-law theory that insurance coverage follows liability and should thus control. *EM Industries* conducted no operation-of-law analysis, however, and the court concluded abruptly that the insurance coverage did not follow the acquisition of the assets and liability.

{¶ 27} Glidden III counters by suggesting that *Texaco A/S, S.A. v. Commercial Ins. Co. of Newark, N.J.* (S.D.N.Y.1995), No. 90 Civ. 2722, 1995 U.S. Dist. LEXIS 15818, holds that New York law recognizes that insurance coverage follows claims by operation of law. However, *Texaco A/S* was decided using merger law and was not analyzed as a corporate acquisition/asset sale that involved contractual acceptance of liability. As discussed in *Pilkington*, the distinction is significant, as courts have recognized that situations in which liability is imposed by operation of law may require transference of insurance coverage by operation of law. *Henkel Corp. v. Hartford Acc. & Indemn. Co.* (2003), 29 Cal.4th 934, 941, 129 Cal.Rptr.2d 828, 62 P.3d 69.

{¶ 28} Further review by this court found no cases directly on point as to whether New York would require insurance coverage to follow by operation of law in the instant circumstances. Because *Pilkington* is directly on point in Ohio and without conflict under New York law, the law as established in *Pilkington* controls as to the insurance-coverage question regarding the post-1967 policies. Neither Ohio nor New York requires insurance coverage in the instant circumstances under an operation-of-law theory. There is no conflict between Ohio and New York law.

{¶ 29} Glidden III raises three "assignments of error" in its brief. Glidden III argues that (1) insurance coverage from the appellants arose by contract, (2) the appellants were collaterally estopped from raising any defense, and (3) the appellants waived or were equitably estopped from presenting the corporate-

history defense. Appellants contend that a cross-appeal was required and that this court should ignore the presented assignments of error.

{¶ 30} R.C. 2505.22 permits the filing of assignments of error by an appellee who has not appealed. The statute states: "In connection with an appeal of a final order, judgment, or decree of a court, assignments of error may be filed by an appellee who does not appeal, which assignments shall be passed upon by a reviewing court before the final order, judgment, or decree is reversed in whole or in part."

{¶ 31} In *Parton v. Weilnau* (1959), 169 Ohio St. 145, 170-171, 8 O.O.2d 134, 158 N.E.2d 719, this court stated that assignments of error of an appellee who has not appealed from a judgment may be considered by a reviewing court only to prevent "a reversal of the judgment under review."

{¶ 32} Further, "an assignment of error by an appellee, where such appellee has not filed any notice of appeal from the judgment of the lower court, may be used by the appellee as a shield to protect the judgment of the lower court but may not be used by the appellee as a sword to destroy or modify that judgment." Id.

{¶ 33} The trial court judgment entry determined the following: (1) collateral estoppel did not prevent contesting the issues in this case, (2) Glidden III was not entitled to any rights of insurance issued to SCM Corporation, and (3) Glidden III was not an insured under any of the policies in question. The opinion found, however, that there was no transfer of insurance benefits by contract and that no benefits passed by operation of law.

{¶ 34} The court of appeals issued a judgment entry that "reversed and remanded" the judgment of the trial court. However, the opinion in fact *affirmed* the holding of the trial court that there was no transfer of insurance benefits by contract and that the appellants were not collaterally estopped from raising the corporate-history defense. It held that the waiver argument was moot.

{¶ 35} The collateral-estoppel and waiver arguments are clearly the "shield" envisioned in *Parton*. Either argument, if successful, would reverse the holding that insurance coverage does not apply by operation of law, as the appellants would be unable to defend the summary judgment sought by Glidden III. And although we are considering the assignment of error arguing that the insurance benefits were assigned by contract, it is important to note that the question of whether the issue is properly before the court is a close one.

{¶ 36} Closely read, the trial court's opinion makes two separate judgments in determining that Glidden III is not entitled to coverage under the policies. The contractual-interpretation question requires a body of evidence and analysis different from the purely legal question of the operation-of-law issue. The court of appeals said so when it "overruled" the assignments of error put forth by Glidden III on this issue, implicitly affirming the judgment of the trial court on this basis. If the issue of insurance coverage constituted one entire judgment, then the court of appeals' discussion of contractual assignment must have been dicta.

{¶ 37} Ultimately, the appellants' argument that we should not address contractual assignment fails. The appellants' motion for partial summary judgment argued both that no assignment of insurance benefits existed and that no coverage arose by operation of law. However, the appellants sought judgment only that no insurance coverage existed, and they received it. Because the court of appeals reversed that judgment, Glidden III may raise the issue of whether the benefits were contractually assigned.

{¶ 38} Glidden III's first assignment of error contends that the court of appeals erred in holding that Glidden III did not receive the rights to the insurance at issue pursuant to the 1986 corporate transactions. Glidden III claims that the 1986 side Letter Agreement between Hanson and ICI transferred the rights to recover under the policy. However, Hanson was not a named insured on any of

the policies. The policies all named as insured SCM (NY) or the "Glidden-Durkee Division of SCM Corporation."

{¶ 39} The insurance policies were explicitly excluded as part of the SCM (NY) liquidation and distribution of assets to HSCM-6 prior to the sale of HSCM-6 to ICI. This makes the side Letter Agreement somewhat confusing: Hanson is agreeing to give to ICI "the benefit of any policy of insurance to the extent the same would provide cover for liability in respect of occurrences relating to the Business," but the insurance policies in question were not even *owned* by the corporate structure being sold. They remained in another Hanson wholly owned subsidiary, SCM (NY), which was not fully dissolved until later in 1986.

{¶ 40} The ultimate question is whether the side Letter Agreement requires SCM (NY) to transfer benefits that SCM (NY) retained under the policies in question. We begin the analysis by noting that parent and subsidiary corporations are separate and distinct legal entities, "even if the parent owns all the outstanding shares of the subsidiary." *Mut. Holding Co. v. Limbach* (1994), 71 Ohio St.3d 59, 60, 641 N.E.2d 1080.

{¶ 41} Absent specific authorization, a parent corporation may not bind a subsidiary. *Linko v. Indemn. Ins. Co. of N. Am.* (2000), 90 Ohio St.3d 445, 450-451; 739 N.E.2d 338; *Whetstone Candy Co., Inc. v. Kraft Foods* (C.A.11, 2003), 351 F.3d 1067, 1075-1076. There is no evidence presented to establish that Hanson had the authority to bind SCM (NY), and the side Letter Agreement does not serve to do so.

{¶ 42} Assuming arguendo that the authority did exist, the plain language of the agreement prohibits it. Hanson itself promises to give to ICI the benefits of any policy of insurance. Hanson did not directly own the policies for which it attempts to convey the benefits. This attempt to totally disregard the corporate formalities is insufficient to establish a conveyance of SCM (NY)'s rights under the insurance policies.

{¶ 43} In its second assignment of error, Glidden III argues that a previous declaratory action in Ohio collaterally estops the appellants from tendering the defenses offered in the instant case. In the prior Ohio action, Glidden III received partial summary judgment ordering the insurers in the instant case to pay the defense costs incurred in connection with an underlying action pending in federal court in Pennsylvania. The prior Ohio action concluded with a settlement and with the plaintiffs dismissing the action with prejudice.

{¶ 44} "The doctrine of issue preclusion, also known as collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different." *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395, 692 N.E.2d 140; see, also, *Norwood v. McDonald* (1943), 142 Ohio St. 299, 27 O.O. 240, 52 N.E.2d 67, paragraph three of the syllabus. Essentially, collateral estoppel prevents parties from relitigating facts and issues that were fully litigated in a previous case. *State ex rel. Shemo v. Mayfield Hts.* (2002), 95 Ohio St.3d 59, 64, 765 N.E.2d 345.

{¶ 45} The question here is whether the previous facts and issues were "fully litigated," given that the case terminated with a dismissal by the plaintiffs. The issues must have been determined by a final appealable order. *State v. Williams* (1996), 76 Ohio St.3d 290, 294, 667 N.E.2d 932.

{¶ 46} In *Denham v. New Carlisle* (1999), 86 Ohio St.3d 594, 597, 716 N.E.2d 184, this court held that all prior interlocutory orders are dissolved after a dismissal, in that "a Civ.R. 41(A) dismissal nullifies the action only with respect to those parties dismissed from the suit." This analysis applies here. The summary judgment in the prior Ohio action never became a final order because

the entire action was nullified with the settlement and dismissal. The doctrine of collateral estoppel cannot be invoked when there is no final order.

{¶ 47} Glidden III's third assignment of error simultaneously claims that the doctrines of waiver and equitable estoppel preclude the appellants from raising the corporate-history defense (the general argument that Glidden III's corporate history has caused any insurance coverage to become unenforceable). Although the court of appeals declared the error moot based on its resolution of the operation-of-law issue, in the interest of judicial economy, we hold that neither waiver nor equitable estoppel precludes the outcome in this case.

{¶ 48} The two doctrines are separate and distinct and therefore must be addressed separately. *Chubb v. Ohio Bur. of Workers' Comp.* (1998), 81 Ohio St.3d 275, 279, 690 N.E.2d 1267.

{¶ 49} Waiver is a voluntary relinquishment of a known right and is generally applicable to all personal rights and privileges, whether contractual, statutory, or constitutional. *State ex rel. Wallace v. State Med. Bd. of Ohio* (2000), 89 Ohio St.3d 431, 435, 732 N.E.2d 960; *State ex rel. Athens Cty. Bd. of Commrs. v. Gallia, Jackson, Meigs, Vinton Joint Solid Waste Mgt. Dist.* (1996), 75 Ohio St.3d 611, 616, 665 N.E.2d 202.

{¶ 50} Glidden III suggests no evidence that the appellants voluntarily relinquished their right to assert a defense based on the corporate history of the parties, other than a failure to raise it during the course of dealings between the parties over the years preceding this litigation, including the prior Ohio action. As discussed, the prior Ohio action ended in a settlement. The settlement explicitly reserved the rights of the appellants to deny coverage should it be determined that coverage does not exist.

{¶ 51} These facts are intrinsically different from those in *Sanitary Commercial Servs., Inc. v. Shank* (1991), 57 Ohio St.3d 178, 182-183, 566 N.E.2d 1215, where as part of a settlement agreement, one party waived the right to

appeal the outcome. There simply is no indication that the appellants voluntarily waived their rights to claim that no coverage exists as a result of the corporate history or for any other reason.

{¶ 52} Equitable estoppel precludes recovery when "one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment." *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn.* (1994), 71 Ohio St.3d 26, 34, 641 N.E.2d 188. Generally, actual or constructive fraud is required. *State ex rel. Richard v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund* (1994), 69 Ohio St.3d 409, 414, 632 N.E.2d 1292.

{¶ 53} Glidden III suggests no actual or constructive fraud other than the alleged waiver, which we have found did not occur. Moreover, Glidden III provides nothing but general allegations that it claims to have relied to its detriment regarding the appellants' failure to raise the corporate-history defense. Equitable estoppel does not apply when there is no actual or constructive fraud and no detrimental reliance.

Conclusion

{¶ 54} Glidden III is not entitled to coverage under any of the appellants' policies by operation of law or by contractual assignment. Further, collateral estoppel, waiver, and equitable estoppel do not apply to prevent the result in this case. Given the preceding, the judgment of the court of appeals is reversed, and the judgment of the trial court is reinstated in its entirety.

Judgment reversed.

MOYER, C.J., LUNDBERG STRATTON and O'DONNELL, JJ., concur.

LANZINGER, J., concurs in judgment only.

RESNICK and PFEIFER, JJ., dissent.

PFEIFER, J., dissenting.

{¶55} In *Pilkington N. Am, Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121, we dealt with a case involving a short line of corporate succession where the original insured made a clear transfer of assets and liabilities to a successor entity. Here, the corporate history is more tangled. Even so, I would hold that the chose in action that arose at the time of the occurrence of the covered loss in this case was ultimately successfully transferred to Glidden III via the 1986 side Letter Agreement between Hanson and ICI. That Hanson, as the majority states, "did not directly own the policies for which it attempts to convey the benefits" is irrelevant. Hanson did own a chose in action — the right to the insurance benefits arising under the policy at the time of the loss — and was free to transfer it. Hanson successfully made that transfer through the side Letter Agreement, wherein it provided that ICI (and eventually Glidden III) would retain "the benefit of any policy of insurance to the extent the same would provide cover for liability in respect of occurrences relating to the Business prior to Closing giving rise to loss, injury, or damage thereafter subject to indemnity on costs." As in *Pilkington*, the chose in action, not an insurance policy, was transferred to the successor entity. Therefore, I would apply this court's holdings in *Pilkington* — as to Questions 1 and 2 — to the facts of this case.

{¶56} Further, even if I agreed with the majority's conclusion that the benefits of the policy were not successfully transferred by contract in this case, I would hold that Glidden III acquired the benefits of the policy through operation of law.

{¶57} The idea that one twist within a tortuous corporate history could absolve an insurer from the duty to indemnify and defend on a claim that arose within the policy period is intolerable. The majority's holding today, that the entity that has assumed liability for past, covered acts does not receive any benefit of the insurance coverage related to that liability, has unacceptable implications

for would-be insureds, for corporate succession in Ohio, and most important, for victims of tortious acts. This case demonstrates that a corporation that succeeds to liability for preacquisition operations of another entity should acquire the rights of insurance coverage by operation of law.

{¶58} This case involves potentially catastrophic losses that allegedly resulted from business activities for which the appellant insurers provided liability coverage. Glidden I paid premiums for that protection. The losses arose during the policy period. The losses were covered under the insurance contracts. Does the transfer of Glidden I's liabilities mean that the coverage never arose? Does the coverage simply vanish as if it had never existed because the policies themselves were not transferred to Glidden III? No. "[The] right to indemnity followed the liability rather than the policy itself. As a result, even though the parties did not assign [the] policy in the agreement, the right to indemnity under the policy transferred to [the successor] by operation of law." *N. Ins. Co. of N.Y. v. Allied Mut. Ins. Co.* (C.A.9, 1992), 955 F.2d 1353, 1357. When the loss arises, the coverage implications become a part of the nature of the liability; the coverage is attached to the liability.

{¶59} The operation-of-law theory offers the simplest, cleanest solution to the problems concerning the effects of corporate restructuring on insurance policies and benefits. Only through recognition of the attachment of coverage to the liability can we have true predictability in corporate restructuring in Ohio. Only then can successor companies know with certainty that indemnity and defense costs will be transferred along with liabilities.

{¶60} Moreover, when coverage follows liability by operation of law, there is no risk that insurers will reap a windfall by denying coverage for covered losses based not upon the nature of the loss, but upon the postloss corporate maneuverings of the entity that paid for the coverage. Should a corporate

structural change that negligibly affects an insurer's obligation be the basis for the complete abrogation of coverage?

{¶61} The disappearance of coverage affects more than corporate successors – it greatly affects the victims of tortious acts. Families that suffered injuries long before Glidden III ever existed will be punished for the manner in which Glidden III came into being. The original tortfeasor may have been reorganized into unrecognizability, but the injuries it caused remain. Despite what the original corporation looked like, whether or not the current incarnation has the resources to face responsibility, the fact is that insurers agreed to cover those very injuries for which the victims seek compensation.

{¶62} Whether the motives for restructuring include an attempt to avoid responsibility for historical acts or to assign liability where it cannot be effectively dealt with, this court should not allow restructuring to also free insurers from their primary responsibility of defending lawsuits and insuring the harm up to the policy limits. The recognition of the transfer of coverage by operation of law holds insurers to their agreement to cover losses, simplifies corporate restructuring, and provides available damages for injured parties. I would affirm the court's holding below.

Resnick, J., concurs in the foregoing opinion.

Anderson Kill & Olick, P.C., William G. Passannante, Cathleen Cinella Tylis, and Cort Malone; Goodman Weiss Miller, L.L.P., Drew A. Carson, and Sarah H. Kostura, for appellee.

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Frantz Ward, L.L.P., Stephen F. Gladstone, and Travis F. Jackson; Wiley, Rein & Fielding, L.L.P., Laura A. Foggan, and John C. Yang, urging reversal for amicus curiae Complex Insurance Claims Litigation Association.

Anderson Kill & Olick (Illinois), P.C., Paul Walker-Bright, and Evan T. Knott; Taft, Stettinius & Hollister, L.L.P., and Timothy C. Sullivan, urging affirmance, for amicus curiae M&M Metals International, Inc.
